TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~361.~~ 159

REUBEN S. CARPENTIER, PLAINTIFF IN ERROR,

vs.

Z. MONTGOMERY, F. L. A. PIOCHE, WILLIAM H. GLASCOCK, V. PERALTA, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED DECEMBER 9, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 361.

REUBEN S. CARPENTIER, PLAINTIFF IN ERROR,

vs.

Z. MONTGOMERY, F. L. A. PIOCHE, WILLIAM H. GLASCOCK, V. PERALTA, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Writ of error	a	1
Citation	c	2
Service	h	3
Answer of Vicente Peralta	15	12
Answer of S. E. Alden	18	13
Bill of exceptions	36	20
Complaint	1	3
Bond	72	34
Judgment	26	16
Map	62	31
Order to amend complaint	21	14
Stipulation	14	11
Verdict	25	15

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of the ninth judicial circuit, district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Reuben S. Carpentier, plaintiff, and Z. Montgomery, F. L. A. Pioche, William H. Glascock, V. Peralta, S. E. Alden, Samuel Merritt, Napoleon B. Byrne, Henry Goddard, George Tait, J. Stratton, J T. Stratton, E. P. Sanford, Stephen Smith, M. A. Lynde, Martin Kellogg, Patrick Tierny, L. Hamilton, F. E. Weston, David McClure, J. Herzog, L. Girard, Sterry Walker, Jacob Hardy, W. H. Friend, G. W. Arms, J. L. Barker, Edward Babson, jr., Henry S. Brooks, E. Janes, D. Davi son, D. S. Sutton, Mary A. Mulliken, T. B. Bigelow, E. Ward, G. W. Parsons, Ann Scanlan, E. P. Flint, Alexander Peterson, N. N. Webster, Thomas McCauley, Edward Cavanagh, J. Ysunga, J. M. French, J. F. Fowler, William Watts, Silas H. Collins, B. W. Carryl, T. Mahony, W. J. Bowen, A. C. R. Shaw, C. W. Hathaway, C. H. F. Palmer, J. B. Woolsey, P. Thompson, S. White, Rebecca T. Knox, James Hutch-
b inson, J. A. Hobart, Ann Wallace, T. C. Taylor, E. B. Walsworth, E. J. Beebe, C. F. Hoffman, P. H. Cordes, G. M. Beaudry, G. Pelladeau, G. E. Beckwith, S. E. Brown, C. W. Tyler, G. W. Dam, A. J. Gladding, J. E. Marchand, Thomas J. Murphy, A. Chabat, Edward A. Harmon, F. A. Kimball, L. W. Kimball, F. M. Kimball, T. B. Simpson, A. F. Williams, James Currier, M. White, M. T. Ashby, W. L. Ferris, C. W. Reid, O. P. Warren, F. Perrin, B. Bon, H. M. Bryant, C. Johnson, James Holland, D. S. Bryant, Martha P. Persey, J. Evoy, M. Evoy, Martin M. Dunn, Ann Dwyer, G. H. Spencer, E. J. Smith, L. G. Bruguiere, W. K. Rowell, C. Flanagan, E. T. Luders, N. W. Spaulding, David Barry, Ja's Dod, Francis Blake, E. Bigelow, S. Nolan, W'm Ashby, P. Unda, C. L. Des Roches, H. D. Houghan, E. McLean, William Hollis, H. Currison, B. Ackerly, Michael Holland, J. N. Olney, John Kelsey, Henry Durant, W. F. Kelsey, Thomas Hardwick, S. White, E. W. Haskell, P. G. Buchanan, J. Stratton, James Gamble, George H. Mumfred, C. H. Merchant, F. C. Coggeshal, F. B. Cassas, M. J. Cassas, Sarah Coburn, C. H. McKeon, B. McGrath, James McElroy, George Mooar, Francis Ball, G. W. Frusher, P. Booyer, T. L. Walker, H. E. Carlton, Hannah Lopez, G. M. Blake, John Terney, Josiah Moulton, José M. Valdez, Ellen Ashcroft, Hugh Clark, Thomas Donovan, Robert Campbell, B. F.
c Ferris, William Tierney, J. B. Baseter, Isaac Davis, F. K. Shattuck, Edson Adams, William Hillegass, Franklin Warner, and Henry Brockhurst, defendants, a manifest error hath happened, to the great damage of the said Reuben S. Carpentier, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf:

You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct

that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this sixth day of December, A. D. 1869, and of the independence of the United States the ninety-fourth.

[SEAL.] L. S. B. SAWYER,
Clerk.

E. K. CARPENTIER,
Att'y for Pl'ff in Error.

d The answers of the judges of the circuit court of the United States for the ninth judicial circuit, district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, except copies of certain answers specially dispensed with by a stipulation of the attorneys for the respective parties, on file in the office of the clerk of said circuit court, and a copy of which is hereto annexed, we certify to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

[SEAL.] L. S. B. SAWYER,
Clerk of said Circuit Court.

(Indorsed:) United States circuit court, 9th circuit, district of California. No. . Reuben S. Carpentier, plaintiff in error, v. W'm Aldrich et al., defendants in error. Writ of error. Filed November 29, 1870. L. S. B. Sawyer, cl'k. E. K. Carpentier, att'y for pl'ff in error.

e United States of America to Z. Montgomery, F. L. A. Pioche, William H. Glascock, V. Peralta, S. E. Alden, Samuel Merritt, Napoleon B. Byrne, Henry Goddard, George Tait, J. Stratton, J. T. Stratton, E. P. Sanford, Stephen Smith, M. A. Lynde, Martin Kellogg, Patrick Tierney, L. Hamilton, F. E. Westen, David McClure, J. Herzog, L. Girard, Sterry Walker, Jacob Hardy, W. H. Friend, G. W. Arms, J. L. Barker, Edward Babson, jr., Henry S. Brooks, E. Janes, D. Davison, D. S. Sutton, Mary A. Mulliken, T. B. Bigelow, E. Ward, G. W. Parsons, Ann Scanlan, E. P. Flint, Alexander Peterson, N. N. Webster, Thomas McCauley, Edward Cavanagh, J. Ysunga, J. M. French, J. F. Fowler, William Watts, Silas H. Collins, B. W. Carryl, T. Mahoney, W. J. Bowen, A. C. R. Shaw, C. W. Hathaway, C. H. F. Palmer, J. B. Woolsey, P. Thompson, S. White, Rebecca T. Knox, James Hutchinson, J. A. Hobart, Ann Wallace, T. C. Taylor, E. B Walsworth, E. J. Beebe, C. F. Hoffman, P. H. Cordes, G. M. Beaudry, G. Pelladeau, G. E. Beckwith, S. E. Brown, C. W. Tyler, G. W. Dam, A. J. Gladding, J. E. Marchand, Thomas J. Murphy, A. Chabot, Edward A. Harmon, F. A. Kimball, L. W. Kimball, F. M. Kimball, G. B. Simpson, A. F. Williams, James Currier, M. White, M. T. Ashby, W. L. Ferris, C. W. Reid, O. P. Warren, F. Perrin, B. Bon, H. M. Bryant, C. Johnson, James Holland, D. S. Bryant, Martha P.
f Persey, J. Evoy, M. Evoy, Martin M. Dunn, Ann Dwyer, G. H. Spencer, E. J. Smith, L. G. Bruguiere, W. K. Rowell, C. Flanagan, E. T. Luders, N. W. Spaulding, David Barry, Ja's Dod, Francis Blake, E Bigelow, S. Nolan, W'm Ashby, P. Unda, C. L. DesRoches, H. D. Houghan, E. McLean, William Hollis, H. Currison, B. Ackerly, Michael Holland, J. N. Olney, John Kelsey, Henry Durant, W. F.

Kelsey, Thomas Hardwick, S. White, E. W. Haskell, P. G. Buchanan, J. Stratton, James Gamble, George H. Mumfred, C. H. Merchant, F. C. Coggeshal, F. B. Cassas, M. J. Cassas, Sarah Coburn, C. H. McKeon, B. McGrath, James McElroy, George Mooar, Francis Ball, G. W. Frusher, P. Booyer, T. L. Walker, H. E. Carlton, Hannah Lopez, G. M. Blake, John Terney, Josiah Moulton, José M. Valdez, Ellen Ashcroft, Hugh Clark, Thomas Donovan, Robert Campbell, B. F. Ferris, William Tierney, J. B. Baxter, Isaac Davis, F. K. Shattuck, Edson Adams, William Hillegass, Franklin Warner, and Henry Brockhurst, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America, to be held in the city of Washington, in the District of Columbia, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, wherein Reuben S. Carpentier, is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the
g parties in that behalf.

Witness the Honorable Ogden Hoffman, one of the judges of the circuit court of the United States, of the ninth judicial circuit, district of California, this 29th day of November, A. D. 1870, and of the independence of the United States the ninety fifth.

OGDEN HOFFMAN,
Dist. Judge.

h We, the undersigned attorneys for defendants in the foregoing citation named, admit due service upon us respectively of the said citation, and the delivery to us of copies thereof.

San Francisco, November 29, 1870.

W. H. & J. R. GLASCOCK,
J. R. GLASCOCK,
Attorneys for Defendants.
BARSTOW & BARBER,
Att'ys for Def'ts.
HENRY P. IRVING,
Att'y for Defendants for whom I appear.
Z. MONTGOMERY, *in person.*
WILLIAMS & THORNTON,
Of Counsel for certain Def'ts.

(Indorsed:) United States circuit court, ninth judicial circuit, district of California. No. 718. Reuben S. Carpentier, pl'ff in error, vs. W'm Aldrich et al., def'ts in error. Citation. Filed on return, November 30th, 1870. L. S. B. Sawyer, clerk, by J. F. O'Beirne, D. C.

1 *Complaint.*

In the circuit court of the United States for the district of California.

REUBEN S. CARPENTIER, PLAINTIFF,
vs.
WILLIAM AULDRICH, GEORGE WELLS ARMES, Silas Adsit, Benjamin Ackerly, Elihu Allen, George W. Anderson, Herman Ash, James T. Ashby, Solomon Adler, William G. Adams, William Allen,

Edson Adams, Jacob F. Adams, William Abbey, Nathaniel D. Arnot, jr., Benjamin C. Austin, Charles W. Anthony, Lucius M. Auldrich, Lucius Allen Auldrich, Stephen Irving, Nicolo Arata, Taddeus B. Bigelow, Douglas G. Barnes, John Barnett, John H. Brewer, George R. Barnes, Elijah Bigelow, George M. Blake, George W. Blair, William Fayette Boardman, Hiram Burdick, Frederick Wiley Benner, William F. Bacon, Orando Button, Isaac H. Brayton, James P. Brown, Christian Bauer, Lorenzo C. E. Bagge, Rollin Barnes, James Brown, Henry A. Butters, Dedrick Bushen, George G. Briggs, Louis G. Bruquierre, Charles Barlow, Samuel V. Blakesley, David P. Barstow, Henry W. Barnes, Philip Booyar, David Berry, Turpin Atwood Baker, Joseph A. Buckingham, Joseph Betancue, Joseph Becht, Robert Birne, George Black, Felix W. Butler, John Bergen, William Bartling, David Barnes, William K. Bacon, Malcolm Bankhead, William Bolza, John
2 Ross Brown, Emanuel Block, William Frederick Band, James H .Berry, Bowman Brown, Truman Franklin Bacon, John Bryan, William S. Blunt, Patrick Barrett, William Barry, George Nelson Briggs, Edward M. Birdsall, James M. Brooks, Harrison H. Briggs, Charles R. Bibber, Charles B. Burroughs, John H. Bockins, Patrick F. Burk, Thomas M. Ball, Hugh Bankhead, Thomas O. Bryan, Pliny Bartlett, Daniel S. Bryant, William P. Blake, Henry D. Bacon, George Henry Brown, William Benitz, Henry H. Barrell, John R. Bortsford, Charles Bradoff, David Black, William Baker, James Butler, George L. Babcock, Spencer C. Brown, William Baker, John Kilgrew Burke, Bernard Bulber, John Breen, Newton Benedick, Peter Baker, Theodore F. Bendenot, Hermosello Balderamos, John B. Beers, John Burke, Hermosello L. Balderamos, Henry H. Bigelow, Charles G. Bryant, John E. Bacon, Octavius A. Bell, John Bray, M. Curtis, Charles H. Coles, Murry Curtis, Thomas Connelly, William W. Crane, jr., Lemuel G. Chapman, Everett F. Caulken, Frederick McLean Campbell, William M. Card, Edward T. Carrique, Jeremiah Callahan, Morris S. Campbell, Herman D. Calkin, John Charit, Edwin H. Clark, Mason P. Caswell, Hugh Clark, Jeremiah Callahan, Philip Cook, Quincy A. Chase, Frank Castro, James Cassidy, John Caddy, John W. Coleman, Andrew Campbell, James D. Cann, Joseph D. Case, William H. Clough, Samuel A. Champlain, James M. Chatfield, John W. Carrick, George A. Crall, James Corcoran, Martin Connely, John Campbell, Dennis Coughlan, John Carmody, Charles Wilson Connor, Lawrence Carr, Edward Cress, Augustus C. Chick, Winfield Curtis, Granville A. Coombs, James W.

Childs, Samuel J. Clark, William S. Cobb,
3 Daniel J. Chase, Casper M. Caldwell, Frank Crandle, Archer S. Cook, George W. Cord, Etienne Chanteron, John Carroll, James Cooper, Thomas A. Cord, Roger Campbell, James J. Cadogan, Bernard Collins, Allen Creamer, James Croak, Edmund Careiy, George A. Chauché, Daniel Carlisle, Herman Cordes, Edmund Carey, Noble G. Collins, John Crowthers, John Coffee, Andrew J. Coffee, Francis Cook, Jeremiah Collins, Henry Durant, Francis M. Dodge, William C. Dodge, Sherman Day, Joseph Dieves, Orrin S. Dunham, Myles Doody, Joseph M. Dillon, Thomas Dombrouski, Frank Duffét, John W. Dwinelle, James De Fremery, Granville M. Davis, James Drugan, Jean C. H. De Tavee, James Deboice, Cornelius Dwyer, Enoch Danforth, George Dugan, Putnam C. Dart, William F. Darrance, Daniel Donnavan, James A. Dye, Charles A. Dudley, Wellington F. Day, Alexander J. Delatour, James Dayley, Thomas Degnan, John Dowden, H. G. M. Dohrman, Eli B. Dunning, Paul Disney, David L. Emmons, Alonzo D. Eames, Charles H. Ellis, Charles A. Elliott, Henry J. Eaton, Jacob W. Esmond, Horace C. Emmons, Edward Esmond, Joseph T. Ernest, Charles Emery, Lucius Emery, James Elliott, Benjamin F. Ferris, John B. Freeman, James Foley, George W. Fountain, George H. Fogg, Edward P. Flint, Joseph Fallon, James S. Fogg, Michael J. Finnegan, George L. Faulkner, Malachi Fallon, Alfred French, Benjamin E. Farwell, John Freeman, William A. Flood, George W. Frashier, Frederick Finkledie, Walter H. Farnum, Peter W. Fonda, Leonard Frasher, James P. Flint, Harvey Fairchild, Alvin D. Farrington, Luther P. Fisher, Henry Finkledie, William K. Flint, George E. Farwell, James M. Fowler,
4 James Falkner, James A. Folger, George Fox, Beriah P. Fisher, Jacob Frederick, William Gauley, William H. Garnett, Edward Gibbons, James Graves, Frank M. Gilcrest, Charles T. Gunn, Seward Garceline, Robert Glover, James J. Gardener, James Gamble, William H. Glasscock, John Gieschew, George Gibson, William Gagan, Samuel F. Gilcrest, John Gilmore, William H. Gray, Christopher Geirsler, Elijah Grover, Rodmon Gibbons, Hugh Gaynor, John Geor, Joseph Geiss, John Grady, Henry T. Gibson, James Gilgan, George Godfrey, James Willard Gregory, Joseph H. Gardner, James Morton Gardner, Bernard Gonnan, John Van B. Goodrich, Malo G. Gilbert, Louis Gnarini, William J. Garnett, William Grewing, Frederick Gotchell, Arthur W. Hawkett, Edwin Hunt, John A. Hobart, Orrin Hamlin, Peter S. Howell, William B. Hardy, Laurentine Hammilton, William Hillegass, John C. Holland, Micah

M. Howe, Ambrose S. Hurlbutt, William Hoskins, Patrick Hayes, John G. Hannaford, Lowell J. Hardey, Nathan B. Hoyt, Thomas Hegeman, Henry Hildebrand, Edward Hoskes, William T. Hurll, Joseph W. Hoag, Levi Heneber, Edward Hunt, Jacob Hardy, Elijah B. Higgins, Charles W. Howard, Richard W. Heath, Jonas Humbert, Henry Harris, Edward Hall, William D. Harwood, Charles D. Haven, Winslow L. Hallett, John R. Hallett, William Hummetenberg, Justus Held, Amos Hersey, James Heart, Thomas H. Henderson, William Hawey, Samuel Hirshberg, John H. Hobart, Hiram E. Hawkins, Ashman C. Henry, Frederick T. Houghton, Edwin Harris, Benjamin R. Hardy, Francis D. Hodgson, Daniel Huddelston, William Haynes, Hezekiah D. Hougham,
5 William Hahn, Thomas J. Haynes, Daniel D. Holland, Orlando S. Holland, Sampson M. B. Haley, Edward Herr, William B. Hyde, Isaac Hyde, Myron T. Holcomb, William Howlett, Frederick L. Holman, John E. Holmes, John Harris, James J. Hatton, Edmund Hogan, John Hobiton, Henry H. Hartwell, Frederick I. Hesse, William Harwood, Michael Harrington, Julius Harris, Thomas S. Hale, Ellis A. Haines, John Hallaghan, John Hill, Joseph S. Herd, Edwin M. Hill, William Irwin, William B. Ingersoll, James H. Ingalls, Cornelius J. Ironmonger, Timothy A. Ingalls, Peter Ipson, Anselm H. Jayne, Elias H. James, Perry Johnson, Henry John, Joshua James, Cornelius Theodore Jacobs, Aquilla Mc P. Janney, Isaac R. Jewell, Arthur W. Jee, Frederick G. E. Janssen, Christopher Jager, Gustavus Jansen, John W. Johnson, Noah Kelsey, Zeno Kelley, Henry E. Knox, Martin Kellogg, James C. Kyle, Charles W. Kellogg, Nicolas S. Knowlton, James Kelley, Melville Kelsey, James J. Kelley, Dennis Kane, Ralph M. Kellogg, Ralph W. Kirkham, Alanson K. Kelton, Thomas Kelley, Charles M. Kelley, Charles Knowles, George A. King, Edward J. Kelley, Laurence Knauer, Frederick C. Knauer, Haston Kimball, Enos L. Kennedy, Christopher A. Klose, John Kelley, Michael Kelley, Samuel P. Knight, Wilhelm Kline, Harlow Kimball, William Kincaid, James Lentell, Willard Leonard, Jacob Letter, Thomas Lynch, Columbus R. Lewis, John W. Lawson, Peter J. Lynch, James M. Luttrell, William C. Little, Melville A. Lynde, William Low, Patrick Lahey, Patrick Lynch, Charles L. Lucas, Thomas Lamb, Joseph Lufkin, Michael Lucky, Thomas Lee, William Land, James Lamere, Frank Lessman,
6 George Lockwood, Nathan R. Lowell, Benjamin Larkin, Leonidas Levi, James M. Learned, Frederick G. Lowe, Hartwell Litchfield, Charles Lafferty, Pierre Lafount, Pierre Lan-

dereaux, Washington S. Lyon, Jacob Lobenstein, Thomas Lamb, Thomas Lynham, John Laing, Leander H. Lowe, Raphus D. Merritt, William W. McKenzie, Benjamin Maloon, George Moar, Seth B. Maloon, Benjamin F. Maloon, William W. Moore, William Mabin, James O. Miner, Benjamin T. Martin, Samuel Merritt, Charles P. McKay, William T. Myles, Frederick A. Merritt, Henry C. McCurie, Thomas Mahoney, James McGuire, Albertus Meyers, David McClure, Edward McLean, Anthony Milton, Michael J. McLaughlin, Peter H. Meyers, William H. Miller, Charles Matty, James F. Miller, Nat R. Metor, Joseph E. Marchand, William G. Moody, Samuel B. McKee, David A. Morse, Charle Mulligan, Richard Myles, Julian A. Magognes, Dennis Mahoney, John Magher, Patrick McQuilken, Thomas Marrs, Patrice McNemara, John W. Morris, John Mackin, John A. Martin, John H. Moody, John W. Martin, William N. Meeks, Thomas McGauley, Henry G. McLean, Henry Miller, Louis Meyers, Michael McLaughlin, John McCarthy, Philip Muscat, John McQuickin, Lawrence Markey, Michael McCabe, John W. Myrick, James F. Mead, Benjamin F. Mann, James H. McLornan, Henry Mallatin, John McHugh, Warren F. Morrell, William McCracken, Samuel B. Martin, Leonard Misch, Michael McGraw, Thomas McGraw, Eugene McCarty, Owen Murray, Charles McOverty, Barclay Muir, Alexander McDonald, Henry Marion, Augus McIsaacs, Timothy H. Myron,

7 Charles W. Miller, Joseph B. McChesney, Andrew Montgomery, William G. Martin, Ernest Nowotomy, Edward Newland, George H. Naegle, Wesley Newcomb, Jeremiah Nealon, Robert Noblet, William Newcomb, Timothy Nolan, Thomas Newcomb, Charles B. Northrop, Cornelius H. Niles, William Neill, George W. Newton, John C. Orr, Lawrence C. Owens, Frederick A. Olney, Samuel E. Oakley, Terrence O'Brien, Charles G. Olney, Bernard O'Reilley, William Ortman, Alvin B. Ordway, Arthur S. Peters, William H. Parshley, Benjamin F. Pendleton, John Potter, William Peters, George Peterson, Thomas H. Pinkerton, James J. Porter, Daniel W. Pratt, Eli W. Playter, Jesus M. Pacheco, Henry A. Palmer, Charles Patensky, Hans H. Peterson, Enoch H. Pardee, Samuel L. Page, John Paul, William H. Pine, Anthony Parker, George Pierson, Francis S. Page, George Pinkham, William A. Paddock, Seth Pinkham, William C. Parker, James Pierson, Walter Prosser, Louis Putrar, Charles A. Paris, Stephen Porter, Joseph Pennypacker, Charles Purdy, Charles G. Reed, William Reed, John H. Richardson, Joseph Roberts, Henry Rogers, Patrick Reily, John R. Rogers, John P. Raymond,

Jeremiah Ryan, Charles Reier, Joseph C. Raynor, George Reed, Edmund C. Rogers, Enos G. Randall, Alfred Rising, David B. Rising, John W. Roberts, Agnew Randolph, John Rackliff, Henry M. Ridley, Charles B. Rutherford, Nathan Rosenberg, John B. Reddick, Richard H. Rand, William H. Russell, Alonzo T. Ruthrauff, Francis Reinstadler, David Ruthyen, Martin Rojain, Moses Russell, Daniel Ring, Martin Ryan, Samuel F. Rodolph, Porter C. Rector, Edmund Philo
8 Sanford, William S. Searing, William H. Somers, Jay K. Smith, Francis K. Shattuck, Levi Shephard, Elzepham Whimore Smith, John Sessions, Nathan Stoel, William B. Smith, John E. Stothers, William Surryhne, Edward C. Sessions, George W. Schribner, Thomas Stack, William Stack, Konrad Schneider, William S. Snook, Oscar L. Shafter, Myles Sweeney, John Sherry, William Sohst, Lewis Shearer, George W. Spencer, Daniel Smith, Joseph B. Scotchler, Walter Smith, John Scott, George H. Smith, James Stratton, Edward N. Smith, James Scothler, Mathew Simmons, Charles W. Stevens, George B. Stamaford, Sextus Shearer, James A. Sanderson, William A. Stewart, Patrick Sully, Michael Sullivan, Charles M. Small, Hugh Shier, Henry Speek, Patrick R. Sheehan, William W. Sheed, Lyman M. Snyder, Zenophon W. Snyder, Frank H. Staples, Franklin A. Smith, Elliot F. Scott, Bishop F. Stilwell, John W. Smith, Corwin F. Smith, Nathan W. Spaulding, Albert Sippit, Joseph W. Shade, Jeremiah Shannon, Joseph Segars, James A. Siddon, Peter Skivington, Isaac Shaw, John V. Scott, Thomas Smith, Robert C. Saufley, Frank H. Sinram, Olive H. Souther, John Smith, Alonzo Schult, James Smith, Silas D. Statt, Stephen Smith, Samuel Thompson, Chauncey Taylor, Nathaniel J. Thompson, Edward Turner, Lewis W. Taylor, Edward Thompson, James S. Thompson, William C. Thompkins, Edward W. Travers, Patrick Tallon, Daniel Tibbits, Orrin P. Truesdale, Harry P. Toothaker, Oliver B. Turrell, Edward Thompkins, Davens Topping, Jeremiah Terrell, John Tratz, John W. Thurman, Bernard Tieman, George Tate, George B.
9 Taylor, P. A. Townes, George Taylor, Daniel Ticknor, Henry A. Tobey, Thomas Tucker, Frederick L. Taylor, Andrew J. Tompkins, Lewis C. Underwood, John C. Van Wyck, Pierre Violich, James B. Van Ankin, David Vogt, Gabriel Vallum, Durben Van Vleck, Albert S. Van Sickle, Rensaler W. Van Sickle, William Van Vorhies, Thomas Wall, Jeremiah E. Whitcher, James C. Wood, Sherman P. Wilcox, Lewis E. Wetmore, Franklin Warner, James E. Winston, Simon H. Whitmore, Henry P. Watkins, Jesse S. Wall, Isaac C. Wingate, Caleb O. Williams, George R. Walk-

er, George A. Walker, Ebron H. Woolsey, Samuel Woods, John Wightman, Lysander Walker, Robert Whitlock, Theodore Wenable, Joseph R. West, Myron G. Wheeler, Barzilla J. Wise, Clement F. Wood, William J. Walker, William Windsor, James Walker, Charles Wood, John A. Whitcher, Peter Williams, Morris Whitchill, Peter T. Wals, Edward B. Walsworth, Erastus B. Walton, John Williamson, William Whitby, John D. Wilson, Albert Weintrant, Theodore A. Winn, Charles A. Wetmore, George M. Yard, Henry S. Yarrington, John Young, John Doe, James Doe, Peter Doe, Henry Doe, William Doe, Thomas Doe, George Doe, Alfred Doe, Hector Doe, Guy Doe, Edward Doe, Horace Doe, Kirke Doe, White Doe, Hugh Doe, Alonzo Doe, Jerome Doe, Alexander Doe, Abraham Doe, Seth Doe, Frederick Doe, John Roe, James Roe, Peter Roe, Henry Roe, William Roe, Thomas Roe, George Roe, Alfred Roe, Hector Roe, Guy Roe, Edward Roe, Horace Roe, Kirke Roe, White Roe, Hugh Roe, Alonzo Roe, Jerome Roe, Alexander Roe, Abraham Roe, Seth Roe, Frederick Roe, John Poe, James Poe, Peter Poe, Henry Poe, William Poe, Thomas Poe, George Poe, Alfred Poe, Hector Poe, Guy Poe, Edward Poe, Horace Poe, Kirke Poe, White Poe, Hugh Poe, Alonzo Poe, Jerome Poe, Alexander Poe, Abraham Poe, Seth Poe, Frederick Poe, John Bush, James Bush, Peter Bush, Henry Bush, William Bush, Thomas Bush, George Bush, Alfred Bush, Hector Bush, Guy Bush, Edward Bush, Horace Bush, Kirke Bush, White Bush, Hugh Bush, Ruth Bush, Alonso Bush, Jerome Bush, Alexander Bush, Abraham Bush, Seth Bush, John Black, James Black, Peter Black, Henry Black, William Black, Thomas Black, George Black, Alfred Black, Hector Black, Guy Black, Edward Black, Horace Black, Kirke Black, Charles Black, Hugh Black, Ruth Black, Alonzo Black, Jerome Black, Alexander Black, Abraham Black, Seth Black, John Green, James Green, Peter Green, Henry Green, William Green, Thomas Green, George Green, Alfred Green, Hector Green, Guy Green, Edward Green, Horace Green, Kirke Green, Charles Green, Hugh Green, Ruth Green, Alonzo Green, Jerome Green, Alexander Green, Abraham Green, Seth Green, John Ball, James Ball, Peter Ball, Henry Ball, William Ball, Thomas Ball, George Ball, Alfred Ball, Hector Ball, Guy Ball, Edward Ball, Horace Ball, Kirke Ball, Charles Ball, Hugh Ball, Ruth Ball, Alonzo Ball, Jerome Ball, Alexander Ball, Abraham Ball, Seth Ball, John Hall, James Hall, Peter Hall, Henry Hall, William Hall, Thomas Hall, George Hall, Alfred Hall, Hector Hall, Guy Hall, Edward Hall, Horace Hall, Kirke Hall, Charles Hall, Hugh

Hall, Ruth Hall, Alonzo Hall, Jerome Hall, Alexander Hall, Abraham Hall, Seth Hall,
11 John Hart, James Hart, Peter Hart, Henry Hart, William Hart, Thomas Hart, George Hart, Alfred Hart, Hector Hart, Guy Hart, Edward Hart, Horace Hart, Kirke Hart, Charles Hart, Hugh Hart, Ruth Hart, Alonzo Hart, Jerome Hart, Alexander Hart, Abraham Hart, Seth Hart, John Lamb, James Lamb, Peter Lamb, Henry Lamb, William Lamb, Thomas Lamb, George Lamb, Alfred Lamb, Hector Lamb, Guy Lamb, Edward Lamb, Horace Lamb, Kirke Lamb, Charles Lamb, Hugh Lamb, Ruth Lamb, Alonzo Lamb, Jerome Lamb, Alexander Lamb, Abraham Lamb, Seth Lamb, John Noakes, James Noakes, Peter Noakes, Henry Noakes, *Henry Noakes*, William Noakes, Thomas Noakes, George Noakes, Alfred Noakes, Hector Noakes, Guy Noakes, Edward Noakes, Horace Noakes, Kirke Noakes, Charles Noakes, Hugh Noakes, Ruth Noakes, Alonzo Noakes, Jerome Noakes, Alexander Noakes, Abraham Noakes, Seth Noakes, John Styles, James Styles, Peter Styles, Henry Styles, William Styles, George Styles, Thomas Styles, Alfred Styles, Hector Styles, Guy Styles, Edward Styles, Horace Styles, Kirke Styles, Charles Styles, Hugh Styles, Ruth Styles, Alonzo Styles, Jerome Styles, Alexander Styles, Seth Styles, Abraham Styles, John Mack, James Mack, Peter Mack, Henry Mack, William Mack, Thomas Mack, George Mack, Alfred Mack, Hector Mack, Guy Mack, Edward Mack, Horace Mack, Kirke Mack, Charles Mack, Hugh Mack, Ruth Mack, Alonzo Mack, Jerome Mack, Alexander Mack, Abraham Mack, Seth Mack, John Box, James Box, Peter Box, Henry Box, William Box, Thomas Box, George Box, Alfred Box, Hector Box, Guy Box, Edward Box, Horace Box, Kirke Box, Charles Box, Hugh Box, Ruth Box, Alonzo Box,
12 Jerome Box, Alexander Box, Abraham Box, Seth Box, John Cox, James Cox, Peter Cox, Henry Cox, William Cox, Thomas Cox, defendants.

Of the 17th day of April, 1868.

DISTRICT OF CALIFORNIA, *ss:*

The said plaintiff complains of the said defendants (of whom the true names of the last three hundred the said plaintiff is ignorant of) and alleges that the said plaintiff is a resident and citizen of the State of New York, and that the said defendants are residents and citizens of the State of California. And for cause of action against the said defendants, the said plaintiff alleges that, on the 13th day of April, 1868, he was seized as owner in fee, and *professed* and entitled to the possession of that certain tract of land situated in the county of Alameda,

and State of California, and bounded as follows, to wit: West by the bay of San Francisco, north by the southern line of the Domingo Peralta reservation, east by the highest ridge of mountains, and south by the Indian Creek gulch and estuary and the estuary of San Antonio; and the improvements thereon, and that he still is such owner in fee and entitled to the possession of said premises, and that the value of the plaintiff's estate therein exceeds $50,000, and that the annual value of the use and occupation thereof is $10,000.

That the plaintiff's title to said premises is derived under grant
13 from the Spanish and Mexican governments, and that five years have not elapsed since the final confirmation thereof.

That afterwards, to wit, on the 14th day of April, 1868, the said defendants entered into and upon the said premises and took exclusive possession thereof and ousted and excluded the said plaintiff therefrom, and that they still continue to hold the exclusive possession of said premises and to exclude the plaintiff therefrom to his damage of one hundred thousand dollars.

Therefore the said plaintiff prays judgment against said defendants for the possession of the said premises, and for $100,000 damages for the said wrongful ouster and withholding, and for the rents, issues and profits of said premises, with costs.

H. W. CARPENTIER,
Attorney for Plaintiff.

(Endorsed:) Filed April 17, 1868. Geo. E. Whitney, cl'k, by A. D. Smith, D. C.

14 *Stipulation.*

U. S. circuit court, dist. of California.

R. S. CARPENTIER
v.
W'M ALDRICH & AL.

It is stipulated that the answers of the several answering defendants herein are substantially the same, except in the matter of the description of the parcels of the demanded premises therein respectively set forth, and that a copy of the answers of defendants, V. Peralta and S. E. Alden, is all that is necessary for the proper examination of this case on error in the Supreme Court.

(Signed) W. H. AND J. R. GLASCOCK,
(Signed) J. R. GLASCOCK,
(Signed) *Attorneys for Defendants.*
(Signed) BARSTOW AND GARBER,
Att'ys for Def'ts.
(Signed) HENRY P. IRVING,
Att'y for Defendants, for whom I appe'r.
(Signed) Z. MONTGOMERY, *In person.*
(Signed) WILLIAMS & THORNTON,
Of Counsel for certain Def'ts.

(Endorsed:) Filed November 30th, 1870. L. S. B. Sawyer, clerk, by J. F. O'Beirne, D. C.

15 *Answer of Vicente Peralta.*

UNITED STATES OF AMERICA:

In the circuit court of the United States in and for the district of California. 6th December, A. D. 1869.

REUBEN S. CARPENTIER, PLAINTIFF,
vs.
W'M ALDRICH ET AL., DEFENDANTS.

Now comes Vicente Peralta, a defendant in the above-entitled action, and for answer to the complaint in said action, denies each and every allegation therein contained.

And for further answer said defendant avers that he was, at the time of the commencement of said action, and is now, the owner in fee and in the possession of a portion of the land described in the complaint, which portion is bounded and described as follows, viz:

All those certain tracts and parcels of land, situated in Oakland township, Alameda County, and State of California, and known, bounded, and described as follows, to wit:

First. All that portion of the "Vicente Peralta reserve" lying south of the line which separates the 400-acre tract from the 300-acre tract in said reserve, and being bounded on the southeasterly side by the county road leading from the Temescal Creek bridge, on Telegraph road, to the Harwood Pass; and on the westerly side line of said reserve; and
16 being all that portion of said reserve lying and being between the said county road, the westerly line of said reserve, and the dividing line between said 400 and 300 tracts, and being the same now and for many years last past occupied by, and in the possession of, the said Peralta. The said reserve is laid down and designated upon the Kellersberger map of the ranchos of Vicente and Domingo Peralta; is Vicente Peralta's reserve, and containing about 700 acres.

Second. That certain tract of land known and described as plot No. 49, as laid down upon the said Kellersberger "Map of the ranchos of Vicente and Domingo Peralta," and which was filed in the Alameda County recorder's office on the 21st day of January, A. D. 1857.

Third. All that certain tract of land known and described as the "Vicente Peralta's reserve," as laid down upon said map of the ranchos of Vicente and Domingo Peralta, and containing about 700 acres of land.

And for a further answer, the defendant says that the said plaintiff ought not to have and maintain his said action, because he avers that neither the plaintiff nor his ancestors, predecessors, or grantors was seized or possessed of the premises herein described, or of any part thereof, within five years next before the time of the commencement of said action; and that he, the said defendant, claims the title to said premises, which title is founded upon written instruments, being conveyances thereof; and that he, and they under whom he claims, entered
17 into the possession of said premises under said conveyances, and have been in the bona fide, actual, and exclusive possession and occupation of said premises, holding the same adversely to the plaintiff and those under whom he claims for more than five years next before the time of the commencement of said action.

Wherefore defendant prays hence to be dismissed with costs.

J. R. GLASCOCK,
Attorneys for said Defendant.

(Endorsed:) Filed 6th Dec., 1869. Geo. E. Whitney, cl'k, by H. F. Lardner, D. C.

18 *Answer of S. E. Alden.*

UNITED STATES OF AMERICA:

In the circuit court of the United States in and for the district of California. 6th December, A. D. 1869.

REUBEN S. CARPENTIER, PLAINTIFF,
vs.
W'M ALDRICH ET AL., DEFENDANTS.

Now comes S. E. Alden, a defendant in the above-entitled action, and for answer to the complaint in said action, denies each and every allegation therein contained.

And for further answer, said defendant avers that he was, at the time of the commencement of said action, and is now, the owner in fee and in the possession of a portion of the land described in the complaint, which portion is bounded and described as follows, viz:

All those certain tracts of land situated in Oakland township, county of Alameda, and State of California, and known and described as follows, to wit:

First. Plots numbers 92, 96, 35, 45, 48, and 50, as the same are laid down and designated upon the Kellersberger map of the ranchos
19 of Vicente and Domingo Peralta, which said map was filed in the county recorder's office of said county of Alameda, on the 21st day of January, A. D. 1857, and was entitled "Map of the ranchos of Vicente and Domingo Peralta," surveyed by Julius Kellersberger.

Second. That certain other tract of land, being the southerly half of an entire tract, which is described as follows: commencing at a point on the Peralta road (Telegraph road) where the same is crossed by the southerly line of plots No. 8, as laid down upon the said Kellersberger's map; thence running north $73\frac{1}{2}^\circ$ $18\frac{66}{100}$ chains to a stake; thence north 11° east $10\frac{50}{100}$ chains to a stake; thence south $74\frac{1}{4}^\circ$ east $18\frac{16}{100}$ chains; thence south 11° west $10\frac{52}{100}$ chains to the place of beginning, containing $18\frac{91}{100}$ acres.

Third. All that portion of plot number two (No. 2) as laid down upon said Kellersberger map, which is bounded by the Peralta road on the east, Elm street on the south, Grove street on the west, and the lands known as the Knox lands on the north.

And for a further answer, the defendant says that the said plaintiff ought not to have and maintain his said action, because he avers that neither the plaintiff nor his ancestors, predecessors, or grantors
20 were seized or possessed of the premises herein described, or any part thereof, within five years next before the time of the commencement of said action, and that he, the said defendant, claims the title to said premises, which title is founded upon written instruments, being conveyances thereof; and that he, and they under whom the claims, entered into the possession of said premises under said conveyances, and have been in the bona fide, actual, and exclusive possession and occupation of said premises, holding the same adversely to the plaintiff and those under whom he claims for more than five years next before the time of the commencement of said action.

Wherefore defendant prays hence to be dismissed with costs.

J. R. GLASCOCK,
Attorney for said Defendant.

(Endorsed:) Filed 6th Dec., 1869. Geo. E. Whitney, cl'k, by H. F. Lardner, D. C.

21 *Order to amend complaint, &c.*

In the United States circuit court in and for the district of California.

REUBEN S. CARPENTIER, PL'FF,
vs.
WILLIAM ALDRICH ET ALS., DEF'TS.

It appearing that the following-named defendants were sued under fictitious names in the above-entitled action, viz: S. E. Alden, as John Doe; William Ashby, as James Doe; Mark J. Ashby, as Peter Doe; J. L. Barker, as William Doe; Ellen Ashcroft, as Henry Doe; L. M. Baudry, as Thomas Doe; G. Peladeau, as George Doe; Francis Blake, as Alfred Doe; N. B. Byrne, as Hector Doe; James L. Barker, as Guy Doe; W. J. Bowen, as Edward Doe; H. M. Bryant, as Horace Doe; E. J. Beebe, as Kirke Doe; Geo. E. Beckwith, as White Doe; Francis Ball, as Hugh Doe; J. B. Baxter, as Alonzo Doe; P. G. Buchanan, as Jerome Doe; Edward Babson, jr., as Seth Doe; Henry S. Brooks, as John Roe; John Caperton, as Peter Hart; B. W. Caryl, as James Roe; James Currier, as Peter Roe; Silas H. Collins, as Henry Roe; A. Chabot, as William Roe; Henry Carrison, as Thomas Roe; Sarah Coburn, as George Roe; H. E. Carleton, as Alfred Roe; F. C. Coggeshall, as Hector Roe; Douglas Davison, as Guy Roe; Martin M. Dunn, as
22 Edward Roe; Ann Dwyer, as Horace Roe; George W. Dam and A. J. Gladding, as Kirke Roe and White Roe; James Dod, as Hugh Roe; C. L. Des Roches, as Alonzo Roe; Thomas Donovan, as Jerome Roe; John Evoy and Mary Evoy, as John Poe and James Poe; Joseph M. French, as Peter Poe; Christopher Flanigan, as Henry Poe; William Henry Friend, as Thomas Poe; L. Girard, as William Poe; Henry Goddard, as George Poe; John C. Hays, as Alfred Poe; C. W. Hathaway, as Hector Poe; James Holland, as Guy Roe; E. D. Harmon, as Edward Poe; James Hutchinson, as Horace Poe; J. A. Hobart, as Kirk Poe; C. F. Hoffman, as White Poe; Michael Holland, as Hugh Poe; Tho's Hardwick, as Alonzo Poe; E. W. Haskell, as Jerome Poe; J. Hertzog, as Seth Poe; L. Hamilton, as John Bush; Charles Johnson, as James Bush; E. Janes, as Peter Bush; Frank A. Kimball, Levi W. Kimball, and Flora M. Kimball, as Henry Bush, William Bush, and Thomas Bush; Rebecca T. Knox, as George Bush; W. F. Kelsey, as Edward Bush; John Kelsey, as Kirk Bush; Martin Kellogg, as White Bush; A. & E. Koenig, as John Black and James Black; E. T. Luders, as Henry Black; Hannah Lopez, as Thomas Black; Timothy Mahony, as Peter Black; McCauly and Cavanaugh, as George Black and Alfred Black; Murphy as Hector Black; Mary Ann Mulliken, as Guy Black; Chas. H. Merchant, as Edward Black; McGrath and McElvoy, as Horace Black and Kirk Black; J. N. Olney, as Charles Black; C. H. F. Palmer, as Hugh Black; Vicente Peralta, as Alonzo Black; Alexander Peterson, as Jerome Black; George W. Par-
23 sons, as Seth Black; Martha P. Percy, as Ruth Black, Perrin and Bond, as John Green and James Green; F. L. A. Pioche, as Peter

Green; W. K. Rowell, as William Green; D. S. Sutton, as Henry Green; A. C. R. Shaw, as Thomas Green; Ann Scanlan, as George Green; Simpson and A. F. Williams, as Hector Green and Alfred Green; J. T. Stratton, as Edward Green; Peter Thomson, as Horace Green; T. E. Taylor, as Kirke Green; John Tierney, as Charles Green; William Tierney, as Hugh Green; Patrick Tierney, as Alonzo Green; Pedro Unda, as Jerome Green; E. Wiard, as Seth Green; W'm Watts, as John Ball; N. N. Webster, as James Ball; Morris White, as Peter Ball; J. B. Woolsey, as Henry Ball; S. White, as William Ball; O. P. Warren, as Thomas Ball; Ann Wallace, as George Ball; Silvanus White, as Alfred Ball; Sterry Walker, as Hector Ball; F. E. Weston, as Guy Ball; Juan Ysunga, as Edward Ball; George Mooar, as John Lamb.

It is ordered that the complaint in said action be amended so as to contain the true names of said defendants, as follows, to wit: S. E. Alden, William Ashby, Mark T. Ashby, Ellen Ashcroft, L. M. Beaudry, and G. Peladeau, Francis Blake, N. B. Byrne, James L. Barker, W'm J. Bowen, H. M. Bryant, E. J. Beebe, Geo. E. Beckwith, Francis Ball, J. B. Baxter, P. G. Buchanan, Edward Babson, jr., Henry S. Brooks, John Caperton, B. W. Caryl, James Currier, Silas H. Collins, A. Chabot, Henry Carrison, Sarah Coburn, H. E. Carleton, F. C. Coggeshall Robert Campbell, Hugh Clark, Douglas Davison, Martin M. Dunn, Ann Dwyer, G. W. Dam and A. J. Gladding, James Dod, C. L. Des Roches, Tho's Donavan, John Evoy and Mary Evoy, J. M. French, Christopher
24 Flanigan, J. F. Fowler, W'm Henry Friend, L. Girard, Henry Goddard, John C. Hay, H. D. Hougham, C. W. Hathaway, James Holland, Edward D. Harmon, James Hutchinson, J. A. Hobart, C. F. Hoffman, Michael Holland, Thomas Hardwick, E. W. Haskell, J. Hertzog, L. Hamilton, Cha's Johnson, J. Janes, Frank A. Kimball, Levi W. Kimball and Flora Kimball, Rebecca T. Knox, W. F. Kelsey, John Kelsey, A. Koenig and E. Koenig, E. F. Luders, Hannah Lopez, Timothy Mahoney, McCaulley and Cavanaugh, Mary Ann Mulliken, Cha's H. Merchant, George Mooar, J. N. Olney, C. F. H. Palmer, Vicente Palmer, Alexander Peterson, G. A. Parsons, Martha P. Percy, Perrin and Bond, F. L. A. Pioche, W. K. Rowell, D. S. Sutton, Ann Scanlon, Simpson and A. F. Wiliams, J. T. Stratton, Peter Thomson, T. E. Taylor, John Tierney, William Tierney, Patrick Tierney, Pedro Unda, E. Wiard, W'm Watts, N. N. Webster, Morris White, J. B. Woolsey, S. White, O. P. Warren, Ann Wallace, Silvanus White, Sterry Walker, F. E. Webster, Juan Ysunza.

(Endorsed:) "Filed 23d August, 1870. L. S. B. Sawyer, clerk."

25 *Verdict*

Circuit court of the United States, ninth circuit, district of California.

R. S. CARPENTIER, PL'FF,
v.
W'M ALDRICH ET AL., DEF'TS. } No. 718.

We, the jury, find for the defendants.

(Signed) G. E. PARMELEE, *Foreman.*

SAN FRANCISCO, *Friday, August* 26, 1870.

(Endorsed:) Filed August 26, 1870. L. S. B. Sawyer, clerk.

26 *Judgment.*

In the circuit court of the United States of the ninth circuit in and for the district of California.

R. S. CARPENTIER
vs.
W'M ALDRICH ET AL. } No. 718.

This cause having come on regularly for trial on the 23d day of August, A. D. 1870, being a day in the June term, 1870, of said court before the court, Honorable Ogden Hoffman, United States district judge presiding, and a jury of eleven men duly impannelled and sworn, E. R. Carpenter, H. K. W. Clark, and W. H. Patterson, esq's, appearing for plaintiff, and Z. Montgomery, esq., defendant, appearing in person; J. R. Glascock, esq., appearing for defendants F. L. A. Pioche, William H. Glascock, John C. Hays, V. Peralta, S. E. Alden, Samuel Merritt, Napoleon B. Bryne, and J. Caperton; W. H. and J. R. Glascock, esqr's, appearing for defendants Napoleon B. Byrne, Henry Goddard, Geo. Tait, J. Stratton, J. T. Stratton, E. P. Sanford, Stephen Smith, M. A. Lynde, Martin Kellogg, Patrick Tierney, and L. Hamilton; W. H. and J. R. Glascock, and D. P. Barstow, esq'rs, appearing for defendants F. E. Weston and David McClure; Barstow and Garber, and W. H. and J. R. Glascock, esq's, appearing for defendants J. Herzog, L. Girard, Sterry Walker, Jacob Hardy, Martin Kellogg, W. H. Friend, G. W. Arms, J. L. Barker, Edward Babson, jr., Henry S. Brooks, E.
27 Janes, D. Davison, D. S. Sutton, Mary A. Mulliken, T. B. Bigelow, E. Ward, G. W. Parsons, Ann Scanlan, E. P. Flint, Alexander Peterson, N. N. Webster, Thomas McCauley, Edward Cavanagh, J. Ysunga, J. M. French, J. F. Fowler, William Watts, Silas H. Collins, B. W. Caryl, T. Mahoney, W. J. Bowen, A. C. R. Shaw, C. W. Hathaway, C. H. F. Palmer, J. B. Woolsey, P. Thompson, S. White, Rebecca T. Knox, James Hutchinson, J. A. Hobart, Ann Wallace, T. C. Taylor, E. B. Walsworth, E. J. Beebe, C. F. Hoffman, P. H. Cordes, G. M. Beaudry, G. Pelladeau, G. E. Beckwith, S. E. Brown, C. W. Tyler, G. W. Dam, A. J. Gladding, J. E. Marchand, Thomas J. Murphy, A. Chabot, Edward A. Harmon, F. A. Kimball, L. W. Kimball, F. M. Kimball, T. B. Simpson, A. F. Williams, James Currier, M. White, M. T. Ashby, W. L. Ferris, C. W. Reid, O. P. Warren, F. Perrin, B. Bon, H. M. Bryant, C. Johnson, James Holland, D. S. Bryant, Martha P. Persey, J. Evoy, M. Evoy, Martin M. Dunn, Ann Dwyer, G. H. Spencer, E. J. Smith, L. G. Brugiere, W. K. Rowell, C. Flanagan, E. T. Luders, N. W. Spaulding, David Barry, Ja's Dod, Francis Blake, E. Bigelow, S. Nolan, W'm Ashby, P. Unda, C. L. Des Roches, H. D. Houghan, E. McLean, William Hollis, H. Currison, B. Ackerly, Michael Holland, J. N. Olney, John Kelsey, Henry Durant, W. F. Kelsey, Thomas Hardwick, S. White, E. W. Haskell, P. G. Buchanan. J. Stratton, James Gamble, George H. Mumford, C. H. Merchant, F. C. Coggeshal, F. B. Cassas, M. J. Cassas, Sarah Coburn, C. H. McKeon, B. McGrath, James McElroy, George Mooar, Francis Ball, G. W. Frusher, P. Booyer, T. L. Walker, H. E. Carlton, Hannah Lopez, G. M. Blake, John Terney, Josiah Moulton, José M. Valdez, Ellen Ashcroft, Hugh Clark, Thomas Donovan,
28 Robert Campbell, B. F. Ferris, William Tierney, J. B. Baxter, and I. Davis; H. P. Irving, esq., appearing for defendants F. K. Shattuck, Edson Adams, William Hillegass; J. F. Havens, esq., appearing for defendants Franklin Warner, and Henry Brockhurst, sued by

the name of Henry Doe; the cause having, on motion of plaintiff's attorneys, been dismissed as to the east half of block No. 57, in Oakland, Alameda County, California. Also, as to that portion of the lands described in the complaint in this action, which is described as follows: All that certain tract, piece, or parcel of land, situate, lying, and being in the county of Alameda, State of California, and bounded and described as follows, viz: Commencing at the southwest corner of lands now or formerly belonging to Dr. Hitchcock, (being plat No. 18, on the map hereinafter referred to,) running thence south 52° (fifty-two degrees) east five chains and fifteen links to a point; thence south 18° 15′, (eighteen degrees fifteen minutes) east five chains and sixty-one links; thence south 19° 30′ (nineteen degrees thirty minutes) east thirty-four chains and twenty-seven links, down to the salt marsh upon the shore of the estuary of San Antonio, and forming the southwest corner of the tract of land hereby released; thence northeastwardly along the line of high-water mark, up to land form'ly claimed by Moore and Bingham, (being plat number 23 on said map,) and forming the southeast corner of the land hereby released; thence north 41° (forty-one degrees) west thirty-two chains and fifty links, to the southeast corner of said land of Dr. Hitchcock, (plat number 18,) and forming the northeasterly corner of the land hereby released; thence south 38° 30′) thirty-eight degrees
29 thirty minutes) west fourteen chains and thirty-eight links to the place of beginning, containing eighty acres, more or less, being parcel of the rancho of San Antonio, and known and designated as plat No. 22, (twenty-two,) upon a map of the ranches of Vicente and Domingo Peralta, made by Julius Kellersberger, and filed in the recorder's office of said Alameda County, and the whole of said plat. Also, as to the lands within the corporate limits of the city of Oakland, Alameda County, California, save and except the parcels hereinafter described, viz:

First. So much of the lands upon the encinal as were not included, or partitioned, or sought to be partitioned in and by a certain deed of partition dated August 15, 1853, made between Joseph K. Irving, John C. Hays, and others, and recorded in the recorder's office of Alameda County, in the State of California, in book "E" of deeds, commencing on page 419 thereof, that is to say, all the lands bounded westerly by a line commencing at the southwest corner of block one hundred and three (103) as laid down on Kellersberger's map of Oakland, referred to in said partition deed; and thence running southerly on a prolongation of the westerly line of the westerly tier of blocks as laid down on said map, (including said block 103,) to ship's channel of San Antonia Creek; thence following said ship's channel easterly and northerly (crossing the bridge leading from Oakland to Clinton) to a point in the prolongation of the northerly line of the most northerly tier of blocks as laid down on said map; thence westerly on said prolonged
30 line to the northeast corner of block number one hundred and ninety-eight (198) on said map; thence southerly and westerly to the point of beginning, following the outer or easterly and southerly lines respectively of the outer or easterly and southerly blocks of land laid down on said map, which said blocks are embraced in said partition deed, and form the easterly and southerly bounds of the lands included therein.

Second. All the land lying in front of, that is, on the water-side of, lots respectively numbered five, (5,) six, (6,) thirteen, (13,) twelve, (12,) eleven, (11,) in tract "D," as the same are laid down upon the map of

Oakland, showing the position of the property of Joseph K. Irving, on file in the office of the recorder of Alameda County, California.

Third. So much of the land south of the encinal line, if any, in front of or bordering upon and outside of tracts "A," "B," and "C," as said tracts are laid down and described in the said partition deed, and which land was not included in said partition deed.

Fourth. Block number four hundred and seventeen (417) as laid down upon the Whitcher map of the city of Oakland, containing about ten and one-half acres.

Fifth. The lands described as follows, according to Whitcher's official map, viz: In block number seventeen, (17,) lots numbers one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) six, (6,) nine, (9,) twenty-seven, (27,) twenty-eight, (28;) in block number nineteen, (19,) lot number nineteen, (19;) in block number twenty-eight, (28,) lot number eighteen,
31 (18;) in block number thirty-one, (31,) lots numbers three (3) and four, (4;) in block number forty, (40,) lots numbers one, (1,) two, (2,) three, (3,) four, (4,) and twenty-eight, (28;) in block number fifty-three, (53,) lot number nine (9;) in block number fifty-four, (54,) lots numbers one, (1,) two, (2,) three, (3,) four, (4,) twenty-seven, (27,) and twenty-eight, (28;) the entire block number sixty, (60;) in block number sixty-five, (65,) lots numbers twenty (20) and twenty-one, (21;) in block number eighty, (80,) lot number twenty-six, (26;) in block number ninety-seven, (97,) lot number eight, (8;) in block number one hundred and fifteen, (115,) lots numbers twelve (12) and thirteen, (13;) the entire block number one hundred and thirty-six, (136;) the entire block number one hundred and thirty-seven, (137;) in block number one hundred and forty-one, (141,) lots numbers seven, (7,) eight, (8,) and north half of lot number nine, (9;) in block number one hundred and forty-two, (142,) lots numbers seven, (7,) eight, (8,) and parts of lots numbers six (6) and nine, (9;) in block number one hundred and forty-seven, (147,) lots numbers five, (5,) six, (6,) seven, (7,) eight, (8,) nine, (9,) twelve, (12,) thirteen, (13,) and fourteen, (14;) in block number one hundred and forty-nine, (149,) lots numbers three, (3,) four, (4,) and five, (5;) in block number one hundred and fifty-nine, (159,) lots numbers fifteen, (15,) sixteen, (16,) seventeen, (17,) and eighteen, (18;) the south half of block number one hundred and sixty-six, (166;) in block number one hundred and eighty, (180,) lots numbers five, (5,) six, (6,) seven, (7,) eight, (8,) nine, (9,) ten, (10,) and eleven, (11;) the entire block number one hundred and ninety-nine, (199;) the entire block number two hundred and seventy-
32 five, (275;) the entire block number two hundred and seventy-six, (276;) the entire block number two hundred and eighty, (280,) except land of F. Delger; in block number two hundred and eighty-one, (281,) lot number twenty-three, (23,) in Tuttle tract; in block number two hundred and ninety-seven, (297,) the N. oak, homestead block C, lot seven, (7;) in block number three hundred and seventy-four, (374,) Centre str., homestead lot number twenty-nine, (29;) block number three hundred and eighty-four (384) entire; block number three hundred and eighty-nine (389) entire; block number four hundred (400) entire, except De Fremery's part; in block number four hundred and six, (406,) in sub-block number twenty-six, (26,) lots numbers twenty-three (23) and twenty-four, (24;) in sub-block number twenty-seven, (27,) lots numbers thirteen, (13,) fourteen, (14,) fifteen, (15,) sixteen, (16,) seventeen, (17,) eighteen, (18,) nineteen, (19,) and twenty, (20;) sub-block number twenty-nine (29) entire; in sub-block number thirty-three, (33,) lots numbers one, (1,) two, (2,) three, (3,) four, (4,) five, (5,) six, (6,) seven, (7,) eight, (8,) nine, (9,) ten, (10,) eleven, (11,) twelve, (12,) thirteen, (13,) fourteen, (14,) twenty-

seven, (27,) twenty-eight, (28,) twenty-nine, (29,) thirty, (30,) thirty-one, (31,) and thirty-two, (32;) in sub-block number thirty-six, (36,) lots numbers sixteen, (16,) seventeen, (17,) eighteen, (18,) nineteen, (19,) and twenty, (20;) in sub-block number thirty-seven, (37,) lots numbers eleven, (11,) twelve, (12,) thirteen, (13,) and fourteen, (14;) in sub-block number thirty-eight, (38,) lots numbers twenty-nine (29) and thirty, (30;) sub-block number forty-nine (49) entire; in northern addition the land
33 assessed in assessment roll of 1868–'69, to C. J. Brenham, Mrs. Canboy, C. S. Green, A. Barstow, A. J. Coffee, W. T. Coleman, John Srine, Mrs. Stanford, J. Ruddle, E. P. Cobb, unknown, unknowns.

Sixth. All the land, marsh-land, or land covered by water within said city limits being in front of and on the easterly, southerly, and westerly sides of the lands above excepted, and extending to the corporate limits of said city on those sides, (for a more particular definition of the object and intent hereof reference is hereby made to the deed of the plaintiff to Henry Hillebrand, dated June 4, 1869, recorded in Alameda Co. recorder's office, in lib. 40 of deeds, pages 617 to 620, and to the stipulation then made and entered into looking to a discontinuance of this suit, as herein provided for, as to all the lands therein mentioned and not excepted;) also, as to defendants John C. Hays and John Caperton, said defendants having stated that they are not in possession, and were not at the commencement of this suit, of the tide or marsh lands inside of the limits of the city of Oakland, and continued as to all the other claimants of marsh and tide lands within the city of Oakland.

And the trial of said action having proceeded upon the 24th, 25th, and 26th days of said August, 1870, upon which last day, after having heard all the proofs of the respective parties, the arguments of counsel, and the instructions of the court, the jury rendered the following verdict, viz:

"We the jury find for the defendants."

Now, therefore, by virtue of the law, and by reason of the premises aforesaid, it is considered and adjudged that the plaintiff take nothing by his said action against the said defendants, Z. Montgomery, F.
L. A. Pioche, William H. Glascock, V. Peralta, S. E. Alden,
34 Samuel Merritt, Napoleon B. Byrne, Henry Goddard, George Tait, J. Stratton, J. T. Stratton, E. P. Sanford, Stephen Smith, M. A. Lynde, Martin Kellogg, Patrick Tierney, L. Hamilton, F. E. Weston, David McClure, J. Herzog, L. Girard, Sterry Walker, Jacob Hardy, W. H. Friend, G. W. Arms, J. L. Barker, Edward Babson, jr., Henry S. Brooks, E. Janes, D. Davison, D. S. Sutton, Mary A. Mulliken, T. B. Bigelow, E. Ward, G. W. Parsons, Ann Scanlan, E. P. Flint, Alexander Peterson, N. N. Webster, Thomas McCauley, Edward Cavanaugh, J. Ysunga, J. M. French, J. F. Fowler, William Watts, Silas H. Collins, B. W. Carryl, T. Mahoney, W. J. Bowen, A. C. R. Shaw, C. W. Hathaway, C. H. F. Palmer, J. B. Woolsey, P. Thompson, S. White, Rebecca T. Knox, James, Hutchinson, J. A. Hobart, Ann Wallace, T. C. Taylor, E. B. Walsworth, E. J. Bebee, C. F. Hoffman, P. H. Cordes, G. M. Beaudry, G. Pelladeau, G. E. Beckwith, S. E. Brown, C. W. Tyler, G. W. Dam, A. J. Gladding, J. E. Marchand, Thomas J. Murphy, A. Chabot, Edward A. Harmon, F. A. Kimball, L. W. Kimball, F. M. Kimball, T. B. Simpson, A. F. Williams, James Currier, M. White, M. T. Ashby, W. L. Ferris, C. W. Reid, O. P. Warren, F. Perrin, B. Bon, H. M. Bryant, C. Johnson, James Holland, D. S. Bryant, Martha P. Persey, J. Evoy, M. Evoy, Martin M. Dunn, Ann Dwyer, G. H. Spencer, E.

J. Smith, L. G. Brugiere, W. K. Rowell, C. Flannagan, E. T. Luders, N. W. Spaulding, David Barry, Ja's Dod, Francis Blake, E. Bigelow, S. Nolan, W'm Ashby, P. Unda, C. L. Des Roches, H. D. Houghan, E. McLean, William Hollis, H. Currison, B. Ackerly, Michael Holland, J. N. Olney, John Kelsey, Henry Durant, W. F. Kelsey, Thomas Hardwick, S. White, E. W. Haskell, P. G. Buchanan, J. Stratton, James
35 Gamble, George H. Mumford, C. H. Merchant, F. C. Coggeshal, F. B. Cassas, M. J. Cassas, Sarah Coburn, C. H. McKeon, B. McGrath, James McElroy, George Mooar, Francis Ball, G. W. Frusher, P. Booyer, T. L. Walker, H. E. Carlton, Hannah Lopez, G. M. Blake, John Terney, Josiah Moulton, José M. Valdez, Ellen Ashcroft, Hugh Clark, Thomas Donovan, Robert Campbell, B. F. Ferris, William Tierney, J. B. Baxter, Isaac Davis, F. K. Shattuck, Edson Adams, William Hillegass, Franklin Warner, and Henry Brockhurst, but that the said defendants go hereof without day. And it is further considered and adjudged that the said defendants do have and recover of and from said Reuben S. Carpentier, plaintiff, their costs in this behalf expended taxed at five hundred and ninety-seven dollars and eighty cents, ($597 80.)

Judgment entered this 26th day of August, A. D. 1870.

L. S. B. SAWYER, *Clerk.*

36 *Plaintiff's bill of exceptions.*

In the circuit court of the United States in and for the district of California.

REUBEN S. CARPENTIER *vs.* WILLIAM ALDRICH ET AL. } Plaintiff's bill of exceptions.

Be it remembered that, on the trial of this action before this court, and a jury duly impan'eled and sworn, the plaintiff, to prove the issue on his part, introduced from the archives of the Spanish and Mexican governments, in California, in the possession of the surveyor general of the United States for California, and duly proved the documents, translations of which are hereto annexed, marked severally, Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21, which were proven to have been duly executed, promulgated and delivered by the persons and officials therein indicated at the respective dates thereof.

II. The plaintiff also proved that Luis Maria Peralta died in the State of California, in August, 1851, and that he left surviving
37 him, as his legitimate children and descendants, and heirs-at-law, four sons, to wit, Ignacio Peralta, Antonio Maria Peralta, Vicenti Peralta, and José Domingo Peralta, and four daughters, to wit, Trinidad Castro, Luisa Castro, Josefa Peralta, and Guadalupe Peralta, and the legitimate descendants of a deceased daughter, Maria Teodora Peralta, (who died before her father the said Luis Peralta.)

That the plaintiff proved mesne conveyances to himself from certain of the heirs of Maria Teodora Peralta of such title, if any, as they inherited from her father, of, in, and to the undivided five and one-half ninths of one-ninth of the premises demanded in this action, and which are a part of the lands mentioned and referred to in said exhibits.

A part of the demanded premises lies southerly, and a portion northerly, of the Temescal Creek, which creek was the northwesterly line, to which the possession, first given by Martinez, was reduced.

The defendants, as to whom this action is tried, were, at
mencement of this suit, and still are, severally in the exclusiv
sion of the parcels of land severally claimed by them in their re.
answers, being portions of the demanded premises, holding th
adversely to the plaintiff.

38 The value of the interest demanded by the plaintiff in the said premises is more than five thousand dollars.

III. The plaintiff then gave parol evidence tending to prove the following facts:

1. That, by the grant of Sola, and the other documents connected with and preceding that grant, and which had been given in evidence as aforesaid, the natural objects described in the original concession, and in the possession given by Martinez, could be ascertained upon the land, and that the objects called for in the second, and reduced or limited possession ordered and given on the representation of the fathers of the mission of San Francisco, and which was intended to be covered by, and included in, the final grant of Sola, can be also ascertained on the ground.

That the original possession given by Martinez, was bounded by the San Leandro Creek on the south, southeast, and east, and the crest of the hills to the gap easterly of the Monumental Rock looking to the north, mentioned in the act or certificate of possession of Martinez; on the north and northwesterly by the creek of the cerrito of San Antonio, and on the west by the bay of San Francisco.

That the boundaries of the restricted possession were the creek of San Leandro on the south, southeast, and east, the Temescal Creek on the north and northwest, and the bay of San Francisco

39 on the west, and that the possession was reduced to the line of the Temescal Creek.

That the sources of the San Leandro Creek and Temascal Creek spring near each other, with merely a narrow dividing ridge between them, not more than a quarter of a mile from the source of the one to the other, and that they both empty into the bay of San Francisco.

The plaintiff also introduced the evidence of witnesses, tending to prove the delivery of possession of the rancho of San Antonio to Luis Peralta, by Lieutenant Martinez, in 1820, and that possession was formally given, and the boundaries designated by Martinez, in accordance with the description thereof, first herein above set forth.

IV. It was then proved that the four sons of Luis Peralta, deceased, presented their petition for the confirmation of their claim for the rancho of San Antonio to the board of commissioners, organized under the act of Congress of March 3, 1851, entitled "An act to ascertain and settle private land claims in the State of California, founding their claim upon the originals of said exhibits heretofore introduced in evidence by the plaintiff, and hereto annexed and upon an alleged devise.

That said rancho was confirmed under said act to said sons of Luis Peralta, in divided parcels. The portion embracing the demanded

40 premises being confirmed to Domingo and Vicente Peralta by final decree of the Supreme Court of the United States, being the same case reported in 19 Howard's Reports, 343, et seq.

No final approved survey has taken place under such confirmation.

The defendants deraign title from the said sons of Luis Peralta, having acquired by mesne conveyances, all the title which they or either of them ever had in or to the parts of the demanded premises severally claimed by the defendants in their said answers.

V. The plaintiff having then rested his case, the defendants, by their

counsel, moved the court to strike out all the evidence introduced by the plaintiff on the ground that the same did not establish nor tend to establish a right in the plaintiff to a verdict.

And thereupon the said motion was argued by counsel for the respective parties; and the said court having heard the said counsel, denied the said motion, on the ground that the same was irregular in practice, and an evasion of the rule against nonsuits; but stated that, if the defendants would submit their case without evidence on their part, the court would instruct the jury to rendef a verdict for the defendants, to which the plaintiff excepted.

The opinion of the court, on denying the said motion, is hereto annexed, marked "A."

41 The defendants thereupon declined to offer any evidence on their part, and the evidence was then closed.

And the court thereupon, at the request of the defendants, decided, charged, and instructed the jury that the plaintiff had failed to establish a case entitling him to a verdict, and that it was their duty to return a general verdict for the defendants, to which decision and instruction the said plaintiff then and there duly excepted. And the said jury thereupon, under such instruction, rendered their verdict for the defendants accordingly.

And because the said exceptions do not otherwise appear of record, the judge presiding at the trial has signed and sealed this bill of exceptions this 26th day of August, A. D. 1870.

(S'g'd) OGDEN HOFFMAN, [SEAL.]
U. S. Dist. Judge for Cal'a.

42 EXHIBIT No. 1.

Exhibit No. 1, *referred to in the foregoing bill of exceptions.*

SEÑOR GOVERNOR: Luis Peralta, sergeant of the royal presidio of San Francisco, and by the superior government appointed commissioner of this pueblo of San José, of Guadalupe, with all due respect and submission appears before your honor and says that at the distance of eight leagues from the Mission of San José, in a northerly or northwesterly course, along the coast, there is a creek named by the reverend fathers of the aforesaid mission, San Leandro, and from this to a little hill adjoining the sea beach, in the same direction and along the coast—there may be four or five leagues, more or less, or about—which place and land he asks and solicits may be granted to him that he may establish a rancho and place thereon all his goods and chattels in order to avoid, by this means, the great loss and damages which he experiences thereof, much to the injury and detriment of his numerous family. Wherefore he asks and solicits of the benign goodness of your honor to grant him the favor he pe'tions for, if it be your honor's pleasure; which will be received with many thanks.

The Lord have you in His holy keeping many years.

43 Kissing your hands.

LUIS PERALTA.

PUEBLO OF SAN JOSÉ, *June 20th*, 1820.

EXHIBIT No. 2.

MISSION OF LA SOLEDAD, *August 3rd*, 1820.

Captain Luis Antonio de Arguello, commandant of the presidio of

San Francisco, will appoint an officer or a sergeant on which he may rely, to place Sergeant Luis Peralta, commissioner of the pueblo of San José in possession of the lands petitioned for, giving previous notice of it to the reverend fathers, the missionaries of the missions bordering on said land, and then place landmarks on the four points of the compass, that it may be known at all times the extent of said lands which have been granted to him; all of which being accomplished you will return to me the originals, that they may be recorded in the archives and give it the proper certificate.

Thus did provide and command Señor Col. Don Pablo Vicente de Sola, political and military governor of this New California, and signed by—

SOLA.

EXHIBIT No. 3.

SAN FRANCISCO, *Aug.* 10*th*, 1820.

Lieutenant Don Ignacio Martinez will proceed to execute the orders of the foregoing superior decree.

44 ARGUELLO.

EXHIBIT No. 4.

SAN JOSÉ, *August* 16*th*, 1820.

In behalf of this mission I say that there is no objection to grant to the petitioner the place he asks. But the creek of San Leandro, where the launches are harbored in summer, must at all times be at the disposal of the mission, and the cutting of wood, comprehended in the place asked for, must remain in common, as it was resolved by the laws of the Indies,

In evidence for all time I inscribe it in continuation of these documents in the same day, month, and year.

(Signed) By FATHER NARCISO DURAN,
Minister of said Mission.

EXHIBIT No. 5.

Return of a writ to give possession to Sergeant Luis Peralta, of the place San Antonio, in the place and deep creek of San Leandro, on the 16th day of August, one thousand eight hundred and twenty.

By virtue of the preceding superior decree of the señor governor of this province of Alta California, Col. Don Pablo Vicente de Sola, commanding that Sergeant Don Luis Peralta be put in possession of
45 the land that he solicits, with the previous notice, and by agreement with the reverend Father Narcisso Duran, minister of the mission of San José, I proceeded to said place, and in presence of the two witnesses, Nicolas Berreyesa and Juan Miranda, the boundaries which separate his land were marked to him, to wit: The deep creek called San Leandro, and at a distance from this, (say about five leagues,) there are two small mountains, cerritos. The first is close to the beach; next to it follows that of San Antonio, serving as boundaries the rivulet which issues from the mountain ranges, and runs along the foot of said small mountain of San Antonio, dividing or separating the land; and at the entrance of the little gulch there is a rock elevating itself in the form of a monument, and looking towards the north. On both

boundaries were fixed firm landmarks; and inasmuch as this individual does not prejudice any of the adjoining neighbors, and by virtue of the authority on me conferred, and in the name of our catholic monarch Señor Don Ferdinand VII, (whom God preserve,) I put in possession of the said land the above-named Luis Peralta.

And that it may be evident for all times, sufficient, and in due form of law, to prevent any difficulty hereafter, I signed it, together with the two assisting witnesses, in the said day, month, and year.

IGNACIO MARTINEZ.

46 Assisting witness:
JUAN MIRANDA.
Assisting witness:
NICOLAS BERREYESA.

EXHIBIT No. 6.

MISSION OF SAN CARLOS, *August 30th*, 1820.

In view of the just reclamation made by the Reverend Father Juan Charbot, as minister of the mission of San Francisco, evidenced in the letter annexed to these prece'dings, when he manifests that Lieutenant Don Ignatio Martinez did not fulfil my decree of the 30th of August, and that through this fault possession has been given of some lands pertaining to said mission, let these be withdrawn from those which were assigned to Sergeant Luis Peralta, and let them be as they were before in favor of the neophites of said mission of San Francisco; and this being done in presence and with the knowledge of its missionary father, this dispatch shall be forwarded to me for its conclusion.

SOLA.

EXHIBIT No. 7.

MISSION OF OUR FATHER,
San Francisco, Sept. 14th, 1820.

Inasmuch as this mission has had possession since the month of November in the year last past, granted by the superior government,
47 for agricultural purposes and the feeding of sheep, as far as a rivulet at the distance from the house of the rancho some three and a half to four leagues in the direction of San José, there is no objection to set the boundaries of Sergeant Luis Peralta from that place up to the creek called San Leandro; and that it may be evidence for all times, we, the ministers of said mission, sign these presents in the same day and year.

FATHER JUAN CHABOT.
FATHER BLAS ORDAZ.

EXHIBIT No. 8.

Return of the writ to mark out new boundaries to the place of Sergeant Luis Peralta.

In the same place, and deep creek of San Leandro, this sixteenth day of the month of September, one thousand eight hundred and twenty, by virtue of the second preceding decree of the señor governor of this province of Alta California, Col. Don Pablo Vicente de Sola commands that the lands which had been assigned to Sergeant Luis

Peralta be withdrawn, pointing to him anew the boundaries at about one league and a half from the hill of San Antonio, towards that part of San Leandro, serving as the dividing line, a rivulet issuing from the mountain or hill range which runs down to the beach, where there is a little forest of willows, (Willow Grove,) fixing in said place the four landmarks which shall be valid, and not those which were desig-
48 nated before on the little mountain of San Antonio; in evidence of which I sign it with the assisting witnesses.

IGNACIO MARTINEZ.

Assisting witness:
JUAN MIRANDA.
Assisting witness:
NICOLAS BERREYESA.

EXHIBIT No. 9.

MONTEREY, *Oct. 18th*, 1822.

This day was issued in favor of Sergeant Luis Peralta, by the governor of this province, the certifying document for the land which has been granted him, as appears in this folio by the writ of possession, which the lieutenant of his company, Don Ignacio Martinez, gave him, agreeably to an order issued him by the government; and this document shall remain filed in the archives of said government.

SOLA.

EXHIBIT No. 10.

Sir PABLO VICENTE DE SOLA,
Political and Military Governor of
New California and Inspector of its Troops, &c.:

In view of the petition which Luis Peralta, sergeant of the cavalry company of the post of San Francisco, made to this government on the 20th of June, 1820, to establish a rancho, or place to raise
49 cattle, did, in the name of his Majesty, (whom God preserve,) grant it to him, having first heard in justice the reclamation made by the right reverend father, ministers of the mission of San Francisco, and having appointed Don Ignacio Martinez lieutenant of the cavalry company of said post, to give him possession of said land, which was done by designating the boundaries about one league and a half from the small hill of San Antonio, towards the part of the San Leandro Creek, serving as a dividing place, a small brook which falls from the mountains or heights running towards the beach, where ends a willow brake, establishing on said land the four landmarks; and in order that in all time to come it may be attested that this concession to said Sergeant Luis Peralta was made in remuneration of forty years honorable service in the military career, I give him this document, signed in the post of Monterey, of Upper California, on the 18th day of October, 1822, second year of the Mexican independence.

PABLO VICENTE DE SOLA.

EXHIBIT No. 11.

SEÑOR CAPITAN.

MY DEAR SIR: Having proceeded, in company with my lieutenant, Señor Don Ignacio Martinez, to the place or land which I peti-

50 tioned for in October in the year last past, through you to the señor governor, agreeably to superior decree of his honor, dated at the mission of La Soledad, the 7th August of the present, I was put in possession of the said land in the name of our monarch, (whom God preserve,) said gentlemen binding me to place suitable monuments as evidence for all times.

By reason of this proceedure the reverend Father Juan Cabor, minister of the mission of San Francisco, represents to his honor the governor, that my lieutenant gave me the possession of the land up to one league and a half, or less than two, from the house of the rancho of said mission, and that I encroach on another place where there is a corral for sheep, put there by the steward mayor domo, two leagues at most distant, which we did not see, as my lieutenant can testify, in regard to which I can say we did not labor in malice. Respecting the reclamation which his reverence makes to the governor, his honor directs that from the lands which were assigned to me, those of which the rancho of the mission had already taken possession should be withdrawn, which I am ready to obey. But I would, firstly, call to your attention that when I petitioned for these lands they had no other owner than our sovereign; secondly, that, if his reverence asked for the same, it was after I had done so, as it is manifest that in his case it was conceded at once, but to me after making three memorials, as you are aware;
51 and if I am entitled to this favor, they ought to have considered me from that time before his reverence. Now the steward established a rancho for sheep on land not belonging to the mission; but as he got the stock on the land before petitioning for it, he settled the same when he pleased, which I could not do, notwithstanding I foresaw it, as I told you.

The reverend father says to the honorable governor that I do not need the land, and that I occupy a great extent; but I would represent that five leagues does not seem to me much in a narrow tract, as you know it is, from the beach to the mountain range, and that not all of it is good, as my lieutenant is aware, for great portions contain hills, creeks, and ravines not fit for the purpose. Such is my need that, for want of it, I have lost a great deal of cattle. I do not say that the mission will not be wanting a piece of land which his reverence solicits may be taken away from me, the same being the best which had been assigned to me. But, though the mission might want it, this would not cause them to lose their stock when I enumerate four ranchos they own with this, with sufficient land for their stock, as any practical man would say who may reconnoitre them, being disinterested, as through this mission rancho I am deprived of the best land which the goodness of the honorable governor had designed to confer on me in the name of his Majesty,
52 (whom God keep,) I am compelled to conform that I may obey. My lieutenant having told me that you had informed him that, if I did not conform, other measures would be taken, I acceded in order to obey, although I consider I have the right to said land, as I asked it before his reverence. But as it is not so much the want the mission feels of the land which his reverence solicits may be taken from me; it seems it is only to contract me.

Wherever emanate repeated complaints with which they molest their superiors, the weaker part will ever be the sufferer.

Wherefore, if you consider that my limited merits do not entitle me to what, in the name of my sovereign, has been assigned me, let there be at least no more complaints. Not taking the hills I mentioned into

consideration, it is natural that I should seek for my stock length of plain and pasture to compensate for their narrowness.

All which I submit to you to the end that, if you think proper, you may present it to his honor the governor, that he may dispose of it agreeably to his superior pleasure.

God preserve you many years.

Pueblo of San José, October 14, 1820.

Kissing your hands, I am your humble serv't,

LUIS PERALTA.

53 EXHIBIT No. 12.

SEÑOR GOVERNOR: The party applying in this representation has appeared before me by means of two memorials, which I transmitted to your hands; and although, upon the first, there was no action had, no doubt because of the many occupations which daily surround your honor, yet, having decreed it, the second one, that the representation shall be made by the party directly to your honor, as it was just and lawful, it had the desirable effect that the interested party derived, as is shown by the decree issued by your honor dated La Soledad, August 3rd, of the year last past, by virtue of which everything was accomplished, as evinced and shown by the writ of return of the lieutenant of my company, Don Ignacio Martinez, by which he gave him formal possession in the name of his Majesty, the documents of which I transmitted to your honor's hands after the interested party was put in possession; but as there are not wanting importunate oppositions, and your honor was beset by them, you disapproved of what had been done, but as the interested party did not conform according to what he manifested to me, I answered that in the other representations I had informed your honor that the plan did not injuriously interfere with any other possession, as it was really so, señor governor, for the mission of San Francisco did not even think of said land of San Pablo until some months after-
54 wards, and I did not wish to allege anything upon what might be presented to your honor directly. Nevertheless he transmitted the enclosed memorial, which I did not wish to present to your honor, because I had no connection with the service; but now, moved with compassion in consideration of a numerous family, of his advanced age, his meritorious services, I feel compelled to express to your honor my sentiments in favor of this individual, that you may render him the justice you may deem due to him in view of the same.

This party, señor governor, even leaving out of the question his being a military man of above forty years service, has rendered many services to the missions of San Francisco, Santa Clara, San José, and Santa Cruz, a great part of their conquest being due to him. His health has almost been sacrificed in repeated excursions to collect his missing herds, and now it is a great pity that for a span of land, they of San Francisco should have established suit against him, it being clear truth what he asserts in his memorial that the said mission of San Francisco turns it all into ranchos in almost every direction, and that even now they have appropriated four good places, subjecting thereby everybody to miserably narrow limits.

Your honor will, above all, provide what may be of your superior pleasure.

San Francisco, June 23rd, 1821.

LOUIS ANTONIO ARGUELLO.

55 EXHIBIT No. 13.

To his honor the GOVERNOR:

I, Luis Peralta, a sergeant of the company of the presidio of San Francisco, with due respect and subordination, appear before your ex'cy and say:

That, on the 19th October, 1819, I petitioned, through my captain, of his honor the governor of the province, Colonel Don Pablo Vicinte de Sola, for the land situated from the arroyo San Leandro to a round hill, (cerrito redondo,) lying near the beach on a northern direction towards the coast, in order to put there my cattle (brenis de campo,) which tract of land, though it appears to be large, is not so, for two reasons: 1st. Because it is situate on the coast, and the space between the beach and the top of the mountains (La Sierra) is too narrow. 2nd. Because in the space lying from San Leandro to the said cerrito redondo, there is a great part of it forming high lands, ravines, and inlets, which are not suitable to the purpose, for which reasons I petitioned to the aforesaid cerrito; and inasmuch as said land had then no other owner than our Sovereign, his honor the governor granted it to me, directing my captain to appoint an officer or sergeant to give me the possession thereof, and to summon previously to appear the reverend minister of the adjacent mission to said land, and said order was litterally complied with by my lieutenant, Señor Don Ygnacio Martinez,
who gave me the possession of said land in the name of our Sover-
56 eign, (whom God preserve) with the corresponding formalities. On the month of November of the same year, the reverend friar, Juan Cabot, minister to the mission of San Francisco, petitioned his honor the governor for the tract of land called San Pablo, distant from my boundaries about one league and a half or two short leagues farther to the north, in order to cultivate it and put sheep thereon; but said reverend father, before petitioning for the land, and before the same was granted to him, directed his sheep (ganado menor) to be sent there, and they were placed on the land which already belonged to me by right, said reverend father being informed of the extent of my property, represented to the governor that I had interfered in his lands, which was on the contrary. Nevertheless, the governor ordered, in a decree of the 30th of August, 1820, that the land which the reverend father said belonged to the mission should be taken away from me, and by so doing I was deprived of the best land which had been granted to me. Although I knew of the narrowness to which my cattle was confined, of my right to the land on account of my having petitioned for it firstly, and of the want I was in for it, I omitted to represent the same to his honor the governor, because I knew that it was of no avail at the time. The reverend father stated to his honor the governor that I do not want the land, to which I reply that the mission wants much less the short tract of land which she has taken from me when the
mission owns four ranchos with that of San Pablo. Such is my
57 want of it (in view of the circumstances explained) that my stock has been confined in too narrow a space.

Wherefore, I beseech your honor's kind piety may be pleased to direct the said land to be returned to me, that my stock may have a larger extent and pasture to feed on, and thus avoid their straying up to the sierra.

Therefore I beseech the benign goodness of your honor to vouchsafe, provided, as I have said, if it should meet your superior pleasure, in which I shall receive sufficient favor.

The Lord preserve your honor many years.
San José, May 15th, 1823.
Your humblest subject, kissing your hands,
LUIS PERALTA.

EXHIBIT No. 14.

MONTEREY, *June 30th*, 1823.

Let the land which, by order of my predecessor, Colonel Don Pablo Vicente Sola, was taken from this claimant after having been granted him and given him possession, therefor be returned to him. He shall apply with his decree to the judge then commissioned for the said possession, that he may comply with it. When this be done he shall annex all the proceedings to the expediente already formed.

ARGUELLO.

58 EXHIBIT No. 15.

In compliance with the foregoing superior decree of the superior chief of this province, Captain Don Lewis Antonio Arguello, the land which, by order of Colonel Don Pablo Vicente de Sola, had been taken from Sergeant Luis Peralta, has hereby been returned to him, and he has newly been put in possession of the place called Cerrito de San Antonio and the arroya (rivulet) which crosses the place to the coast, where is a rock looking to the north. Said Peralta has received lawful possession in presence of the same witnesses who assisted when the first possession was given to him. In witness whereof they signed it on said location and place on the 4th of December, 1824.

YGNACIO MARTINEZ.

JUAN MIRANDA.
NICOLAS BERREYESA.

EXHIBIT No. 16.

A description showing the extent of the lands granted me, and of which I was placed in possession, since the year 1820, to wit:

Along the coast of the mission of San José, in a northwesterly course, there is a deep creek called San Leandro, forming the dividing boundary of said mission of San José; thence to a small round mountain called San Antonio, the dividing boundary with my neighbors Francisco Castro, which space is a little over four leagues long, and, as it
59 is the narrowest portion of the coast, it at most contains half a league in breadth from the mountain to the sea. In the said tract there are in one place two rivulets issuing from the ridge, which, in the rainy season run and empty themselves into the sea; during the other part of the year they remain dry, for, owing to the scarcity, the water remains up amidst the mountain range. In another place there are also two rivulets of the same nature. One of them waters a small willow grove adjoining the inlets, on the borders of which are the sewing fields depending upon the seasons for water, (siembras de temporal,) for, owing to the scarcity of water, they cannot be irrigated.

There is also, along the seashore, a forest of oaks so bad and without water that the cattle do not relish even to this day, their watering-place being among certain small willow trees and oaks on the margin of the rivulets, and oaks on the hillsides. And because my stock suffered from the fact of their being scattered, much to the great detri-

ment of my numerous family, I asked, and they granted me, the said land; and, notwithstanding its narrowness, scarcity of water, its hills, and various branc'es (or arms) of various inlets, not good for the purpose, I kept them, in peace 1,300 head of cattle, 2 droves of mares, and 1 drove of asses, which description I transmit to the superior hands of the señor commandant general in compliance with the superior
60 orders of the 7th of October of the present year.

Rancho of San Antonio, Dec'r 19th, 1827.

LUIS PERALTA.

EXHIBIT No. 17.

Exhibit No. 17, *being order referred to in foregoing exhibit.*

José Mª. de Echandia, commandant general and superior political chief of both Californias:

The most excellent territorial deputation of New California have passed the following resolutions:

Article 1st. During the remainder of the present year the father ministers of the missions shall present to the superior government of the territory a statement in relation to the lands occupied by the establishments under their charge, setting forth the boundaries of the same, the extent of the irrigable sowing and grazing lands, and also if any woods are included within said boundaries, and what arroyas or springs water said lands.

Article 2nd. The commissary of Monterey and the officers in charge of government property shall also present the same statement in relation to the national ranchos and the places where the horses are kept.

Article 3rd. The ayuntamientos and every individual in possession of a rancho shall make a like statement in relation to the same, annexing thereto the titles of his possession, or the foundation he may have for such possession.

Dated Monterey, October 7th, 1827.

61 EXHIBIT No. 18.

Exhibit No. 18.—*Expediente.*

Proceedings at the instance of Don Ignacio Peralta, soliciting the place called San Antonio.

No. 345.] [1844.

MONTEREY, *Feb.* 12*th*, 1844.

Let the secretary of state of this government report on the same.

MICHELTORENA.

To his excellency the GOVERNOR:

Ignacio Peralta, of the pueblo of San José, with the greatest respect before your excellency presents himself, and says that the rancho called San Antonio, lying between the mission of San José and San Pablo Point, was granted to my father at the time when this department was governed by Señor Don Pablo Vicente de Sola; and that, after that, Lieutenant Don Ignacio Martinez, by superior order, gave him possession, any other authority being at that time unknown.

By annexed document your excellency will perceive that the docu-

ment which secured the property and its possession to the petitioner were mislaid. For this reason I request that your excellency will condescend to order the issue of a new title in favor of my father, Don Luis Peralta, to the extent expressed by the document of Señor
62 Sola as plat of survey (design) that accompanies it, including the range of this up to its summit, and thence to the sea.

I therefore solicit that, using your goodness, your excellency will be pleased to grant me what I ask and make oath, &c.

Monterey, February 11th, 1844.

Excellent sir,

IGNACIO PERALTA.

(Here follows map marked page 62.)

EXHIBIT No. 19.

SEÑOR GOVERNOR:

By the document which Don Ignacio Peralta exhibits, he accredits that to his father was granted a tract of land called San Antonio, agreeably to the extent shown by the design which he presents, and it is twenty-two years, since the government of that period made the grant and ordered possession to be given, the interested parties having occupied said land since the year 1819. I believe that there is no objection whatever, to granting him a new title, but in fixing the boundaries to the tops of the mountains it will be convenient that it be under the condition not to prevent the neighbors on the Contra Costa from cutting the wood which they might need for their own use, but not to sell the same.

The superior discernment of your excellency will dispose what may be convenient.

MANUEL JIMENO.

MONTEREY, *Feb'y* 13*th*, 1844.

63 EXHIBIT No. 20.

Let the title be issued under the conditions expressed by the señor secretary, those of the law and of the citation of the neighbors before the possession, in order to avoid subsequent reclamations.

MICHELTORENA.

EXHIBIT No. 21.

MONTEREY, *Feb'y* 13*th*, 1844.

In view of the petition first annexed to this proceeding, the documents which accredit the ancient possession by Don Luis Peralta of the tract of land called San Antonio, with all that was represented, and was liable to be seen in conformity with the laws and regulations relative to the subject, I declare the said Don Luis Peralta owner in fee of said land which is bounded as follows, namely: On the southeast by the creek of San Leandro, on the northwest by the creek of Los Cerritos de San Antonio, (the small hills of San Antonio,) on the southwest by the sea, and on the northeast by the tops of the hill range, without prohibiting the inhabitants of the Contra Costa from cutting wood for their own use, they not to sell the same.

Let the proper warrant (voucher) be issued, enter the same in the respective book and let this expediente be transmitted to the excellent departmental assembly for their approval.

His excellency the governor thus ordered, decreed, and signed.

64 EXHIBIT A.

Paper marked "A," referred to in the foregoing bill of exceptions.

The COURT: The motion that was made yesterday to strike out all the evidence in this case, which in effect amounts to directing a nonsuit and to a decision by the court that upon the case made by the plaintiffs they cannot recover involves really two questions: First, as to the nature of the title shown by the plaintiff; and, secondly, whether upon such title, an action of ejectment may be maintained. It is claimed that this is an imperfect title and that no ejectment will lie upon it, and such has been unanimously held by the supreme court of this State to be its character, after elaborate argument.

It is unnecessary to say how far that decision would be controlling authority with this court, but it is certainly entitled to the highest respect, and, unless clearly erroneous, ought to be followed; I am not only far from thinking it erroneous, but I quite agree that no other view can be taken of this title. It cannot for a moment be contended that the title, as now proved, can be called perfect for any but a small portion of this rancho, that is from the San Leandro to the Temescal. Up to that point there was at one time a grant to Luis Peralta which might possibly be said, together with the possession given to him, to confer and constitute a perfect and absolute title; but in the title for the part
65 beyond the Temescal I discover none of the elements of a complete title. A petition was made by Luis Peralta, an order to the lieutenant of the pueblo of San Francisco, Ygnacio Martinez, to put him in possession, and possession was given; but, before any title was issued, the governor determined, on the reclamation of the fathers, to withdraw a part of the land, which he did. He ordered a new possession to be given, and for the restricted or limited quantity a grant was issued; but no grant was issued for the larger quantity and the whole title would stand upon a petition of the grantee, Peralta, and an order to an officer to put him in possession executed by that officer; this, though it created an equity and when followed by subsequent occupation would have constituted a right of property which ought to be respected, was wanting in the elements of a complete title, for there is no document translative of the final title, or which may be called a grant. The only part of the rancho then for which any document constituting a complete title has been exhibited is the part between the San Leandro and the Temescal. As to this it is concluded that the grant was incomplete, for the want of definite boundaries established by the grant itself, or by the possession given by Martinez.

The idea recently suggested that the San Leandro Creek throughout its whole course was intended to be the boundary on the east as well as on the south, finds no place in previous discussions in the proceed-
66 ings of the parties, and is inconsistent with Peralta's own statements. If there was ever any foundation for such a pretension it appears to have been entirely abandoned when Ygnacio, in his father's behalf, petitioned afterwards for another grant with new boundaries, viz: The tops of the hills which are to the westward of the upper portion of the San Leandro, thereby waiving any right, if any existed, for the further boundary beyond the hills up to the San Leandro and the land on the eastern slope of the mountains. This petition is not only inconsistent with any supposed boundary beyond the hills, but it would seem to show that, up to that time the eastern boundary was supposed to be the base of the hills, for he asks that the new boundaries may be fixed

at the top. And this view is corroborated by the previous return or report of Peralta in which he speaks of his land as extremely narrow and only about one half a league in width. It is however unnecessary to go into the subject at length, for it was fully argued and considered and decided by the supreme court.

I see no answer to the opinion of Judge Crockett, which was concurred in by all the judges who took part in the decision. As that opinion comes recommended to me by such high authority, I should follow it, even though myself disposed to distrust its correctness; but agreeing most heartily with it, as I do, I have no hesitation in accepting that as deciding the case, to wit, that the grant now proved,
67 under which the plaintiff claims, was an incomplete grant.

The next question is, can an ejectment be maintained under an incomplete grant? or rather, can ejectment be maintained on an incomplete grant, not presented for confirmation, as against parties holding under a title presented to and confirmed by the United States courts? It is not necessary to examine all the reasons which led the supreme court of this State, and in my judgment, very properly, and almost from the very necessity of the case, to allow ejectments to be maintained on incomplete Spanish titles—that is, on titles made by the governor, but unapproved by the departmental assembly. The long delays that necessarily occurred between the presentation of the claim and the final issuing of the patent, the fact that lands were exposed to the intrusions of squatters, and that the grantee was obliged to pay taxes on the land, whilst in many instances he was not permitted to enjoy its fruits, perhaps weighed powerfully with the supreme court when treating the grant of the governor as conveying the right of entry and possession, or an interest in the land, as Judge Taney remarked, sufficient to enable the grantee to hold the possession against mere trespassers. Certainly, that right of possession which was respected, and a grant which was accepted as a sufficient muniment of title by the former government, it was no great violation of principles to treat as entitled to similar protection and recognition in our
68 courts against trespassers without color of right. The limits of this right of possession were necessarily determined by the grant. But the question now presented is, can the action of ejectment be maintained on an incomplete grant, which has not been presented for confirmation? No case is produced where ejectment has been maintained on such a claim. The law prescribes that all lands, the claims to which shall not be presented, are to be regarded as part of the public domain. The constitutionality of that law, as applied at least to imperfect grants, inchoate titles, or merely claims upon the generosity or the justice of the United States, is not questioned. The supreme court in Estrada vs. Murphy, have decided this matter absolutely, and the same doctrine has been reaffirmed in several cases, and it is said that these decisions have been mentioned with approval by the Supreme Court of the United States. They declare that a title not presented must be treated as nonexistent. It has no standing in court, and of course it cannot, under such circumstances, be the foundation for an action of ejectment.

The point may admit of some doubt, perhaps, for there is some plausibility in the view that the provision in the act of Congress was merely intended to secure the presentation of some claim for the land, and that if a claim were presented, and the land was found to be private
69 land, and not public, the land was saved from forfeiture, and the right of any person really entitled under the old Mexican grant, would not be lost, simply because he had not presented his claim; the

object of the proceeding being not to determine questions of private right, inter partes, but to determine the status of a particular tract, whether public or private lands. Whatever degree of force there may be in this suggestion, decisions of the Supreme Court which have been referred to, have established a contrary doctrine. Every unpresented claim is to be regarded as non-existent.

Certainly no case can be found where the holder of an unpresented claim has been allowed to maintain ejectment against the holder of a confirmed title. For the purposes of this decision, it is not necessary to go further. There are some inconsistencies, perhaps, in the decisions of the supreme court of this State, and it is not altogether easy to reconcile the doctrine of Castro vs. Wilson, with the decisions of the court in Estrada vs. Murphy, and other cases. For if a title not presented, is to be deemed to be non-existent, it is hard to see how this dead and abandoned title can be resuscitated into vitality, because the person claiming it files his bill in chancery against the confirmee, instead of commencing an action of ejectment. If it is dead, it seems to me it is dead for all purposes. It may be very doubtful, therefore, whether this extreme doctrine can be maintained.

70 It is sufficient, however, for the purposes of this case, to say that the plaintiff, having shown a title under an incomplete and imperfect grant, not presented for confirmation, and the defendant appearing to derive title from a grant and claim confirmed by the board, the plaintiff cannot maintain ejectment, and his remedy, or that of the sisters, if they have rights, would be after the patent has been issued to the confirmees, to file their bill in equity, praying that the patentees be decreed to stand seized for their uses, or to convey the property or their shares of it, to them. If it shall appear that the confirmees have such relations to the sisters as to charge them with any trust or affect their consciences in favor of the sisters, or to make it inequitable that they should hold this land, as against their sisters, the remedy is in a court of equity, to have the trust declared and their rights enforced, but not in a court of law, by an action of ejectment.

In regard to the motion to strike out the testimony, it is a novel and perhaps irregular proceeding in this court. The better plan is for the defendants to submit their case, and on the testimony I will direct the jury to return a verdict in their favor. I decline to strike out the testimony upon your motion, Mr. Williams, but if you choose to go to the jury without calling any witnesses, I will direct the jury to return a verdict in favor of the defendants.

71 (Endorsed:) Filed August 26th, 1870. L. S. B. Sawyer, clerk. By J. F. O'Beirne, D. C.

72 *Bond.*

Supreme Court of the United States. On writ of error from the circuit court of the United States of the ninth judicial circuit, district of California.

Know all men by these presents that we, Reuben S. Carpentier, as principal, of the city of New York, State of New York, and C. I. Hutchinson, of the city of San Francisco, in the State of California, manufacturer, and Frank McCoppin, of the said city and State, contractor, are held and firmly bound unto Z. Montgomery, F. L. A. Pioche, William H. Glascock, V. Peralta, S. E. Alden, Samuel Merritt, Napoleon

B. Byrne, Henry Goddard, George Tait, J. Stratton, J. T. Stratton, E. P. Sanford, Stephen Smith, M. A. Lynde, Martin Kellogg, Patrick Tierney, L. Hamilton, F. E. Westen, David McClure, J. Herzog, L. Girard, Sterry Walker, Jacob Hardy, W. H. Friend, G. W. Arms, J. L. Barker, Edward Babson, jr., Henry S. Brooks, E. Janes, D. Davison, D. S. Sutton, Mary A. Mulliken, T. B. Bigelow, E. Ward, G. W. Parsons, Ann Scanlan, E. P. Flint, Alexander Peterson, N. N. Webster, Thomas McCauley, Edward Cavanagh, J. Ysunga, J. M. French, J. F. Fowler, William Watts, Silas H. Collins, B. W. Carryl, T. Mahoney, W. J. Bowen, A. C. R. Shaw, C. W. Hathaway, C. H. F. Palmer, J. B. Woolsey, P.
73 Thompson, S. White, Rebecca T. Knox, James Hutchinson, J. A. Hobart, Ann Wallace, T. C. Taylor, E. B. Walsworth. E. J. Beebe, C. F. Hoffman, P. H. Cordes, G. M. Beaudry, G. Pelladeau, G. E. Beckwith, S. E. Brown, C. W. Tyler, G. W. Dam, A. J. Gladding, J. E. Marchand, Thomas J. Murphy, A. Chabot, Edward A. Harmon, F. A. Kimball, L. W. Kimball, F. M. Kimball, T. B. Simpson, A. F. Williams, James Currier, M. White, M. T. Ashby, W. L. Ferris, C. W. Reid, O. P. Warren, F. Perrin, B. Bon, H. M. Bryant, C. Johnson, James Holland, D. S. Bryant, Martha P. Persey, J. Evoy, M. Evoy, Martin M. Dunn, Ann Dwyer, G. H. Spencer, E. J. Smith, L. G. Bruguiere, W. K. Rowell, C. Flanagan, E. T. Luders, N. W. Spaulding, David Barry, Ja's Dod, Francis Blake, E. Bigelow, S. Nolan, W'm Ashby, P. Unda, C. L. Des Roches, H. D. Houghan, E. McLean, William Hollis, H. Currison, B. Ackerly, Michael Holland, J. N. Olney, John Kelsey, Henry Durant, W. F. Kelsey, Thomas Hardwick, S. White, E. W. Haskell, P. G. Buchanan, J. Stratton, James Gamble, George H. Mumford, C. H. Merchant, F. C. Coggeshal, F. B. Cassas, M. J. Cassas, Sarah Coburn, C. H. McKeon, B. McGrath, James McElroy, George Mooar, Francis Ball, G. W. Frusher, P. Booyer, T. L. Walker, H. E. Carlton, Hannah Lopez, G. M. Blake, John Terney, Josiah Moulton, José M. Valdez, Ellen Ashcroft, Hugh Clark, Thomas Donovan, Robert Campbell, B. F. Ferris, William Tierney, J. B. Baxter, Isaac Davis, F. K. Shattuck, Edson Adams, William Hillegass, Franklin Warner, and Henry Brockhurst, in the sum of twelve hundred dollars, lawful money of the United States of America, to be paid to the said Z. Montgomery, F. L. A. Pioche, William H. Glascock, V. Peralta, S. E. Alden, Samuel
74 Merrit, Napoleon B. Byrne, Henry Goddard, George Tait, J. Stratton, J. T. Stratton, E. P. Sanford, Stephen Smith, M. A. Lynde, Martin Kellogg, Patrick Tierney, L. Hamilton, F. E. Westen, David McClure, J. Herzog, L. Girard, Sterry Walker, Jacob Hardy, W. H. Friend, G. W. Arms, J. L. Barker, Edward Babson, jr., Henry S. Brooks, E. Janes, D. Davison, D. S. Sutton, Mary A. Mulliken, T. B. Bigelow, E. Ward, G. W. Parsons, Ann Scanlan, E. P. Flint, Alexander Peterson, N. N. Webster, Thomas McCauley, Edward Cavanagh, J. Ysunga, J. M. French, J. F. Fowler, William Watts, Silas H. Collins, B. W. Carryl, T. Mahoney, W. J. Bowen, A. C. R. Shaw, C. W. Hathaway, C. H. F. Palmer, J. B. Woolsey, P. Thompson, S. White, Rebecca T. Knox, James Hutchinson, J. A. Hobart, Ann Wallace, T. C. Taylor, E. B. Walsworth, E. J. Beebe, C. F. Hoffman, P. H. Cordes, G. M. Beaudry, G. Pelladeau, G. E. Beckwith, S. E. Brown, C. W. Tyler, G. W. Dam, A. J. Gladding, J. E. Marchand, Thomas J. Murphy, A. Chabot, Edward A. Harmon, F. A. Kimball, L. W. Kimball, F. M. Kimball, T. B. Simpson, A. F. Williams, James Currier, M. White, M. T. Ashby, W. L. Ferris, C. W. Reid, O. P. Warren, F. Perrin, B. Bon, H. M. Bryant, C. Johnson, James Holland, D. S. Bryant, Martha P. Persey, J. Evoy, M. Evoy, Martin M. Dunn, Ann Dwyer, G. H. Spencer,

E. J. Smith, L. G. Bruguiere, W. K. Rowell, C. Flanagan, E. T. Luders, N. W. Spaulding, David Barry, Ja's Dod, Francis Blake, E. Bigelow, S. Nolan, W'm Ashby, P. Unda, C. L. Des Roches, H. D. Houghan, E. McLean, William Hollis, H. Currison, B. Ackerly, Michael Holland, J. N. Olney, John Kelsey, Henry Durant, W. F. Kelsey, Thomas Hardwick, S. White, E. W. Haskell, P. G. Buchanan, J. Stratton,
75 James Gamble, George H. Mumfred, C. H. Merchant, F. C. Coggeshal, F. B. Cassas, M. J. Cassas, Sarah Coburn, C. H. McKeon, B. McGrath, James McElroy, George Mooar, Francis Ball, G. W. Frusher, P. Booyer, T. L. Walker, H. E. Carlton, Hannah Lopez, G. M. Blake, John Terney, Josiah Moulton, José M. Valdez, Ellen Ashcroft, Hugh Clark, Thomas Donovan, Robert Campbell, B. F. Ferris, William Tierney, J. B. Baxter, Isaac Davis, F. K. Shattuck, Edson Adams, William Hillegass, Franklin Warner, and Henry Brockhurst, their heirs, executors, or administrators; to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated November 29th, A. D. 1870.

Whereas the above-named Reuben S. Carpentier has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the circuit court of the United States of the ninth judicial circuit, district of California, in an action wherein said Reuben S. Carpentier was (is) plaintiff, and said Z. Montgomery, F. L. A. Pioche, William H. Glascock, V. Peralta, S. E. Alden, Samuel Merritt, Napoleon B. Byrne, Henry Goddard, George Tait, J. Stratton, J. T. Stratton, E. P. Sanford, Stephen Smith, M. A. Lynde, Martin Kellogg, Patrick Tierney, L. Hamilton, F. E. Westen, David McClure, J. Herzog, L. Girard, Sterry Walker, Jacob Hardy, W. H. Friend, G. W. Arms, J. L. Barker, Edward Babson, jr., Henry S. Brooks, E. Janes, D.
76 Davison, D. S. Sutton, Mary A. Mulliken, T. B. Bigelow, E. Ward, G. W. Parsons, Ann Scanlan, E. P. Flint, Alexander Peterson, N. N. Webster, Thomas McCauley, Edward Cavanagh, J. Ysunga, J. M. French, J. F. Fowler, William Watts, Silas H. Collins, B. W. Carryl, T. Mahoney, W. J. Bowen, A. C. R. Shaw, C. W. Hathaway, C. H. F. Palmer, J. B. Woolsey, P. Thompson, S. White, Rebecca T. Knox, James Hutchinson, J. A. Hobart, Ann Wallace, T. C. Taylor, E. B. Walsworth, E. J. Beebe, C. F. Hoffman, P. H. Cordes, G. M. Beaudry, G. Pelladeau, G. E. Beckwith, S. E. Brown, C. W. Tyler, G. W. Dam, A. J. Gladding, J. E. Marchand, Thomas J. Murphy, A. Chabot, Edward A. Harmon, F. A. Kimball, L. W. Kimball, F. M. Kimball, T. B. Simpson, A. F. Williams, James Currier, M. White, M. T. Ashby, W. L. Ferris, C. W. Reid, O. P. Warren, F. Perrin, B. Bon, H. M. Bryant, C. Johnson, James Holland, D. S. Bryant, Martha P. Persey, J. Evoy, M. Evoy, Martin M. Dunn, Ann Dwyer, G. H. Spencer, E. J. Smith, L. G. Bruguire, W. K. Rowell, C. Flanagan, E. T. Luders, N. W. Spaulding, David Barry, Ja's Dod, Francis Blake, E. Bigelow, S. Nolan, W'm Ashby, P. Unda, C. L. Des Roches, H. D. Houghan, E. McLean, William Hollis, H. Currison, B. Ackerly, Michael Holland, J. N. Olney, John Kelsey, Henry Durant, W. F. Kelsey, Thomas Hardwick, S. White, E. W. Haskell, P. G. Buchanan, J. Stratton, James Gamble, George H. Mumfred, C. H. Merchant, F. C. Coggeshal, F. B. Cassas, M. J. Cassas, Sarah Coburn, C. H. McKeon, B. McGrath, James McElroy, George Mooar, Francis Ball, G. W. Frusher, P. Booyer, T. L. Walker, H. E. Carlton, Hannah Lopez, G. M. Blake, John Terney,

Josiah Moulton, José M. Valdez, Ellen Ashcroft, Hugh Clark,
77 Thomas Donovan, Robert Campbell, B. F. Ferris, William Tierney, J. B. Baxter, Isaac Davis, F. K. Shattuck, Edson Adams, William Hillegass, Franklin Warner, and Henry Brockhurst were (are) defendants.

Now, therefore, the condition of this obligation is such, that if the above-named Reuben S. Carpentier, shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

REUBEN S. CARPENTIER, [SEAL.]
By E. R. CARPENTIER, *his Att'y in Fact.*
C. I. HUTCHINSON. [SEAL.]
FRANK McCOPPIN. [SEAL.]

Sealed and delivered in the presence of—

UNITED STATES OF AMERICA,
District of California, Ninth Judicial Circuit,
City and County of San Francisco, ss:

C. I. Hutchinson and Frank McCoppin, the sureties named in the foregoing bond, being each duly sworn, each for himself says that he is a resident of said district of California, and a freeholder therein; that he is worth double the amount of the penalty of the above bond, over and above his property, which is by law exempt from execution.

C. I. HUTCHINSON.
FRANK McCOPPIN.

Subscribed and sworn to before me this 29th day of November, A. D. 1870.

L. S. B. SAWYER,
Comm'r U. S. Cir. C't, &c.

78 The foregoing bond is approved as to its form and execution, and the sufficiency of the sureties.

Dated Nov. 29, 1870.

(Signed) OGDEN HOFFMAN,
Dist. Judge.

(Endorsed:) Filed 29th November, A. D., 1870. L. S. B. Sawyer, clerk.

79 UNITED STATES OF AMERICA,
District of California, ss:

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, district of California, hereby certify that the foregoing seventy-eight written pages number from 1 to 78, both inclusive, are full, true, and correct copies of—

	Page.
1st. Answer of Vicente Peralta	15
2nd. " " S. E. Alden	18
3rd. Bill of exceptions	36
4th. Complaint	1
5th. Bond	72

6th. Judgment 26
7th. Order to amend complaint 21
8th. Stipulation 14
9th. Verdict 25

And that the same together constitute the return to the foregoing writ of error.

Witness my hand and the seal of said circuit court, this 30th day of November, A. D. 1870.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Indorsement on cover:) No. 361. Reuben S. Carpentier, plaintiff in error, vs. Z. Montgomery, F. L. A. Pioche, William H. Glascock, V. Peralta, et al. California C. C. U. S. Filed 9th December, 1870.

IN THE

Supreme Court of the United States.

No. 159.—December Term, 1871.

REUBEN S. CARPENTER, Plaintiff in Error,

vs.

Z. MONTGOMERY AND OTHERS.

Brief of Counsel for Plaintiff in Error.

M. BLAIR,
F. A. DICK,
Of Counsel for Plaintiff in Error.

Pearson, Printer, corner 9th & D sts., Washington, D. C.

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Supreme Court of the United States.

No. 159.—December Term, 1871.

REUBEN S. CARPENTER, Plaintiff in Error,

vs.

VINCENTE PERALTA, Z. MONTGOMERY, AND OTHERS.

Brief of Counsel for Plaintiff in Error.

STATEMENT.

This is an action of ejectment, brought by the plaintiff in error in the Circuit Court of the United States for the District of California, to assert the title of Maria Teadora Peralta, against the defendants, claiming under her brothers, to an undivided interest in the Rancho San Antonio, of which their father, Luis Maria Peralta, had, in August, 1851, died seized, having been in possession for thirty years, claiming to hold it under a grant from the Spanish government.

The only question in the case is, whether Luis Peralta, the father, had such an interest in the land, by virtue of the grant and his long possession under it, as would enable one of his heirs to maintain an action of ejectment against others of his heirs who had ousted her and had procured a confirmation of the father's title under the act of 3d March, 1851. On the trial the plaintiff showed,

by documentary evidence from the archives, that on 20th June, 1820, Luis Peralta, who was then sergeant of the presidio near San Francisco, and commissioner of the pueblo of San José, presented a petition to the governor,

PERALTA'S PETITION,

in which he said that, "at the distance from the mission of San José of eight leagues, in a northerly or northwesterly course along the coast, there is a creek named by the reverend fathers of said mission San Leandro, and from this to a little hill adjoining the sea-beach, in the same direction and along the coast, there may be four or five leagues, more or less, (or about,) which place and land he asks and solicits may be granted to him."

WRIT OF POSSESSION.

Governor Sola, on the 3d of August, 1820, ordered Captain Luis Antonio de Arguello, commandant of the presidio, to appoint an officer to put Sergeant Peralta "in possession of the lands petitioned for, first giving notice to the fathers of the mission bordering on said land, *and then place land-marks on the four points of the compass*, that it may be known at all times, the extent of said lands *which have been granted to him*."

On the 10th Arguello appointed Lieutenant Martinez to execute this decree.

On the 16th Father Duran certified, on behalf of the mission of San José, that there was no objection, on the part of that mission, to the grant asked for by Peralta.

EXECUTION OF WRIT OF POSSESSION.

On the same day Martinez certified that, having given due notice, he "proceeded to said place, and in presence of the two witnesses, Nicolas Berreyesa and Juan Miranda, *the boundaries which separate his (Peralta's) land were marked out to him*, to wit: The deep creek called San Leandro, and, at a distance from this, (say about five leagues,)

there are two small mountains, cerritos. The first is close to the beach; next to it follows that of San Antonio, serving as boundaries the rivulet which issues from the mountain ranges, and runs along the foot of said small mountain of San Antonio, dividing or separating the land; and, at the entrance of the little gulch, there is a rock elevating itself in the form of a monument, and looking towards the north. *On both boundaries were fixed firm* [redacted] *land-marks;* and, inasmuch as this individual does not prejudice any of the adjoining neighbors, and by virtue of the authority on me conferred, and in the name of our Catholic Monarch, Senor Don Ferdinand VII., (whom God preserve,) I put in possession of the said land the above-named Luis Peralta."

This return was signed by him and the witnesses in testimony of the facts.

ORDER OF DISPOSSESSION.

On the 30th Governor Sola, reciting that Father Chabot, of the mission of San Francisco, alleged that Peralta had been put in possession of some lands belonging to said mission, ordered him to be dispossessed of so much of the land as was claimed by that mission.

Fathers Chabot and Orday, in a paper dated 14th September, claim "as far as a rivulet, (the Temescal,) at the distance of three and a half to four leagues, in the direction of San José."

DISPOSSESSION.

On the 16th Lieutenant Martinez reported that, in the presence of the same witnesses, he had executed the order of the governor of the 30th August "by appointing to him (Peralta) anew the boundaries at about one and a half leagues from the hill of San Antonio towards that part of San Leandro, serving as a dividing line the rivulet (the Temescal) issuing from the mountain or hill-range, which runs down to the beach, where there is a little

forest of willows, (Willow Grove,) fixing on said place the *four* land-marks, which shall be valid, and not those that were designated before," &c.

RECORD ENTRY OF GRANT.

On the 18th October, 1822, Governor Sola certifies that "this day was issued, in favor of Sergeant Luis Peralta, by the governor of this province, the certifying document *for the land, which has been granted to him, as appears in this folio, by the writ of possession.*"

CERTIFYING DOCUMENT.

The certifying document recites the original petition of Peralta, the reclamation of the fathers of the mission, the appointment of Martinez to give possession, the performance of that order by putting Peralta in possession between the Temescal and San Leandro, and concludes by saying that this document is given "in order that, in all time to come, it may be attested that this concession to said Sergeant Peralta was made in remuneration of 40 years of service in the military career."

PROTEST OF PERALTA AND ENDORSEMENT OF ARGUELLO.

On the 14th of October, 1820, Sergeant Peralta addressed a letter to his captain, Arguello, complaining of having been dispossessed of the land which had been assigned to him. In that letter he insists that he has a right to the land, and declares that he yielded up the possession only because he was compelled to do so. He replies also to the allegations of the fathers, that he does not need so much land, by saying that "five leagues does not seem to me much, in a narrow tract, as you know it is, from the beach to the mountain range," &c. On 23d June, 1821, Captain Arguello transmitted the memorial of Peralta to the governor, gave the history of Peralta's application, insisted upon his right to the land, and stated

his claim upon the government for long and meritorious services as a soldier.

SUIT FOR RESTITUTION.

On the 15th of May, 1823, Peralta petitioned the governor directly, praying that "the land may be returned" to him, showing that the reverend father of the mission had practiced a fraud to induce the governor to dispossess him, by which he says, "I was deprived of the best land *which had been granted to me.*" He again refutes the charge that the tract was too large, by saying, "though it appears to be large, it is not so, for two reasons—1st, because it is situated on the coast, *and the shore between the beach and the top of the mountains* (La Sierra) is too narrow; 2d, because in the space lying from San Leandro to the said Ceruto rodondo there is a great part of it forming high lands, ravines, and inlets, which are not suitable for the purpose," etc. Upon this petition, on 30th November, 1823, the following

JUDGMENT FOR RESTITUTION AND THE GROUND THEREFOR.

order or decision was made: "Let the land which by order of my predecessor, Senor Don Pablo Vincente Sola, was taken from this claimant, *after having been granted him and possession given, therefore* (for that reason) *be returned to him.* He shall apply with this decree to the judge then commissioned (Lieut. Martinez) for the said possession, that he may comply with it. When this be done, he shall annex all the proceedings to the expediente already formed.—ARGUELLO."

EXECUTION OF THE JUDGMENT.

On the 24th December, 1824, Martinez, who was the person formerly commissioned as the judge to deliver the possession, certifies that, "in compliance with the foregoing superior decree of the superior chief of the province, Capt. Don Luis Antonio Arguello, the land which by

order of Col. Don Pablo Vincente de Sola had been taken from Sergeant Luis Peralta, has hereby been returned to him, and he has been newly put in possession of the place called Cerrito de San Antonio and the arroyo (rivulet) which crosses the place to the coast where is a rock looking to the north; said Peralta has received lawful possession of the same in the presence of the witnesses who assisted when the first possession was given to him."

RETURN TO GOVERNOR ECHANDIA.

On 7th of October, 1827, Governor Echandia issued an order requiring every individual in possession of a ranche to make a statement describing the boundaries thereof, annexing thereto the title of his possession and the foundation he may have for such possession.

In pursuance thereof Peralta returned "a description showing the extent of the lands granted me and of which I was placed in possession since the year 1820, to wit: Along the coast of the mission of San José there is a deep creek called San Leandro, forming the dividing boundary of said mission of San José, thence to a small round mountain called San Antonio, the dividing boundary with my neighbor, Francisco Castro, which space is a little over four leagues long, and as it is the narrowest portion of the coast, it at most contains half a league *from the mountain to the sea.*"

PETITION FOR NEW TITLE PAPERS.

On 11th February, 1844, Ignacio Peralta applied to Governor Micheltorena on behalf of his father for a new title, stating that the title papers had been mislaid, and describing the land as the Rancho San Antonio, situated between the mission of San José and San Pabla point, which was granted to his father by Senor Don Pablo Vicente de Sola, and of which he was put in possession by Lieutenant Don Ignacio Martinez by superior order, any other authority being at that time unknown. The

new grant to be "to the extent expressed by the document of Governor Sola as plat of survey (design) that accompanies it, including the range of hill up to its summit, and thence to the sea."

JIMENO CERTIFIES THAT THE LAND HAD BEEN GRANTED.

The governor referred this petition to Jimeno, then Secretary of State, who reported that the land shown by this plat presented *had been granted twenty-two years previously, and had been occupied by the grantee since* 1819, and that there was no objection whatever to the grant of *a new title.* The governor ordered the title to issue on the 13th of February. An instrument was accordingly drawn, which is found in the archives, declaring that Luis Peralta was "the *owner in fee* of said land, which is bounded as follows, namely: on the southeast by the creek of San Leandro, on the northwest by the creek of Los Cerritos de Antonio (the small hills of San Antonio); on the southwest by the sea, and on the northeast by the tops of the hill range," and directing that this expediente be submitted to the departmental assembly. But this paper was not signed.

PAROL TESTIMONY.

The plaintiff gave parol testimony of the following facts:

That by the grant of Sola, and the other documents connected with and preceding that grant, and which had been given in evidence as aforesaid, the natural objects described in the original concession, and in the possession given by Martinez, could be ascertained upon the land, and that the objects called for in the second, and reduced or limited possession ordered and given on the representation of the fathers of the mission of San Francisco, and which was intended to be covered by, and included in, the final grant of Sola, can also be ascertained on the ground.

That the original possession given by Martinez was bounded by the San Leandro creek on the south, southeast, and east, and the crest of the hills to the gap easterly of the monumental rock looking to the north, mentioned in the act or certificate of possession of Martinez; on the north and northwesterly by the creek of the cerrito of San Antonio, and on the west by the bay of San Francisco.

That the boundaries of the restricted possession were the creek of the San Leandro on the south, southeast, and east, the Temescal creek on the north and northwest, and the bay of San Francisco on the west, and that the possession was reduced to the line of the Temescal creek.

That the sources of the San Leandro creek and Temescal creek spring near each other, with merely a narrow dividing ridge between them, not more than a quarter of a mile from the source of the one to the other, and that they both empty into the bay of San Francisco.

The plaintiff also introduced the evidence of witnesses tending to prove the delivery of possession of the rancho of San Antonio to Luis Peralta, by Lieutenant Martinez, in 1820, and that possession was formally given, and the boundaries designated by Martinez, in accordance with the description thereof, first herein above set forth.

It was then proved that the four sons of Luis Peralta, deceased, presented their petition for the confirmation of their claim for the rancho of San Antonio, to the board of commissioners organized under the act of Congress of March 3, 1851, entitled "an act to ascertain and settle private land claims in the State of California," founding their claim upon the originals of said exhibits heretofore introduced in evidence by the plaintiff, and hereto annexed, and upon an alleged devise.

That said rancho was confirmed under said act to said sons of Luis Peralta, in divided parcels. The portion embracing the demanded premises being confirmed to Domingo and Vicente Peralta by final decree of the Su-

preme Court of the United States, being the same case reported in 19 Howard's Reports, 343, et seq.

No final approved survey has taken place under such confirmation.

The defendants' deraign title from the said sons of Luis Peralta, having acquired by mesne conveyances all the title which they or either of them ever had in or to the parts of the demanded premises severally claimed by the defendants in their said answers.

DECISION OF CIRCUIT COURT.

The court directed the jury to find against the plaintiff, holding (1st) that the title of Luis Peralta was incomplete, and (2d) that an action of ejectment could not be maintained on his title and possession for thirty years against co-tenants who had ousted plaintiff because they had presented Peralta's title and procured its confirmation under the act of 1851.—(p. 32.)

ARGUMENT.

The questions in the case are, therefore, 1st. Whether Peralta's title was complete. 2d. If not, whether the confirmation only, without the survey and patent, constitutes a defence to an action of ejectment, brought by one of the heirs of Peralta who did not join in the petition and confirmation, against the heirs who presented the claim to the board under the act of 1851, and obtained the decree of confirmation.

The ruling of the court on the first point is contrary to the express decision of this court on this title in 19 Howard, p. 343.

The court says, p. 348: "The grant by Sola of a portion of the tract of which Peralta had originally been put in possession, *is a complete grant in fee of that portion.* The restoration by Arguello of the original boundaries by decree and act of the public officer may not have the charac-

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ter of a complete grant." On this latter point, however, the court expresses no opinion, it being sufficient for the purpose of the case, then before the court, if the title was merely an equity. But is there any deficiency, and, if so, in what does it consist? Not in the want of power on the part of the officer by whom the title was given, to make a complete title. The court, in 19th H., decides that the governor had power at that date to grant a complete title. The only question then, is, did he exercise it? No special forms are prescribed in the instructions of the Viceroy of 17th Aug., 1773. The 13th article merely says: "titles being granted to them in such forms as to make them masters," &c.—(Jones' Report, App. No. 3.) Nor is any form for making title prescribed in the regulations of Governor Don Filipe Neve, of 1799, which were confirmed by royal decree of Oct. 14, 1781, (App. No. 1, Jones' Report,)where the 14th article is given—the only one relating to this subject; the others relate to the presidios and military.—(Jones' Report.) The question of the completeness or incompleteness of the grant is to be decided, therefore, upon the nature of the transaction itself, and the effect given to it by the public authorities.

When this title was here before and its validity passed upon, the court held the title to be complete to the land south of the Temescal. This was because there was on the record a certificate signed by the governor, which recited the several acts by which the title to that part of the land had been granted. This certificate did not include, and the court did not pronounce upon, the character of title presented, to the northern part of the tract, it not being necessary for the purpose then in view. To have done so, the court would have been called upon to analyze the certifying document itself and the acts which it recited, and determine whether the acts themselves, or the recital of them constituted the grant, and to determine whether the one expediente in the record contained two grants or only one. All of which points the

court omitted to pass upon, although it might have done so, as the law authorized it to pass upon all descriptions of titles.

It is to these points we now invite the attention of the court. We maintain, *first*, that the certifying document is not the grant, and, *second*, that there was but one grant.

1st. As to the certifying document, exhibit 10, p. 25.

This paper does not purport to grant the land. It is only what the governor who made it called it—"a certifying document"—that is, a certificate that certain acts by which the lands have been granted are of record. Nor are we left in doubt as to what previous action it is to which this effect is attributed. Exhibit 9, on p. 25, is a record entry of the issue of the certifying document to Luis Peralta. This entry declares this to be the certifying document for the land which has been granted to him "*by the writ of possession which the lieutenant of his company, Don Ignacio Martinez, gave him, agreeable to an order issued to him by the governor.*" It was, in other words, the livery of seizin of a defined tract of land in the presence of the neighbors, by an order of the governor, which constituted the grant. Certainly this was sufficient to pass the title.

"Lands might have been transferred by a verbal contract only, provided it was attended with a solemn and public delivery of the possession, till the latter end of the reign of King Charles the Second."—(Cruse's Digest, vol. 4, p. 10.)

Governor Sola's order of 3d August, directing the possession to be given, itself treats that act as the completion of the grant. The land-marks which he directs the officer to place are to make known "the extent of the lands *which have been granted.*"

The *titulo* issued by the governor under the law of 1824, and regulations of 1828, is analogous to "the certifying document" under the previous regime, though there is one important difference. "The titulo given to the party," says the court in Bolton's case, 23 Howard, 350,

"is merely a *certificate* by the governor of the acts that have been done." "In virtue of this document possession of the land shall be given. But the document is not sufficient of itself to prove that the governor has officially parted with a portion of the public domain. This must be done by record evidence found in the archives." In other words, it is the acts that have been done as recorded in the archives, not the certificate of the governor that such acts are of record, which constitutes the grant, even where that certificate is the warrant upon which the party may be put in possession. Still less could it be deemed the grant when it is not the warrant upon which the party is put in the possession, or any part of the process of making the grant, which is the difference between the *titulo* under the Mexican law and the certificate issued under the Spanish rule.

CONSTRUCTION OF THESE ACTS BY MEXICAN AUTHORITIES.

Second. Peralta did not, in his petition of 15th May, 1823, apply for a grant. He merely asks the governor "to direct the land (of which he was dispossessed under the Sola's order of 30th August, 1820) be returned to him." He insists that "his honor, the governor, *granted it to me*, directing my captain to appoint an officer or sergeant to give me the possession thereof, and to summons previously to appear the reverend minister of the adjacent mission to said land, and said order was literally complied with by my lieutenant, Senor Don Ignacio Martinez, who gave me the possession of said lands in the name of our sovereign, (whom God preserve,) with the corresponding formalities." He then proceeds to state that the Reverend Juan Cabot, minister to the mission of San Francisco, knowing that the land belonged to him, had caused the sheep of the mission to be "placed on the lands *which already belonged to me*," and then falsely represented that he, Peralta, had interfered with the mission lands. Yet the governor ordered that the land which

the mission claimed should be taken from him, and in this way, he says, "*I was deprived of the best land which had been granted to me.*"

This petition is the formal assertion of a vested right in a specific piece of land, and a prayer that said land, of which he had been unlawfully dispossessed, may be restored to him as a matter of justice. It will be observed also that, in the remonstrance against the dispossession he had suffered, dated 14th October, 1820, addressed to Captain Arguello, and by him submitted to the governor, Peralta says, in reference to the order for his dispossession, "I am compelled to conform that I may obey, my lieutenant having told me that you had informed him that, if I did not conform, other measures would be taken. I acceded in order to obey, although I consider that I *have a right to said land.*" In other words, he yielded possession only because he was threatened with forcible ejection. He considered himself, then, illegally ejected from land which belonged to him of right, the same having been granted to him by the order of the governor, made on his petition, which assigned it to him; and the execution of that order, with all due formality, by the officer charged with that duty, in the presence of witnesses, and after due notice to the neighboring proprietors, and the formal return of that officer upon the writ of possession. The land having been granted to him, he asks only to be restored to the possession so improperly taken from him. Arguello having become governor, and being, as it appears by his letter of 23d June, 1823, submitting Peralta's remonstrance to Governor Sola, fully conusant of the injustice that had been done Peralta at the instance of Cabot, ordered "that the land which, by order of my predecessor, Don Pablo Vicente Sola, *was taken from this claimant, after having been granted to him and given him possession, therefore be returned to him.* He shall apply, with this decree, to the judge, then commissioned, for the said possession, (who was Lieut. Martinez,) that he may com-

ply with it. When this shall be done he shall all annex the proceedings to the expediente already formed."

This is, in terms, a judgment of restitution, not a proceeding for a new grant; on the contrary, it states as the ground for the restitution, it pronounces the fact that the land "was taken from the claimant after having been granted him, and given him possession," and he directs the officer who executes this order to "annex all proceedings to the expediente already formed."

The record would then show that the party was in full possession, with the judgment of the governor declaring that the original order of the governor, and the investiture under it, was a complete grant of the land, and so complete that it was beyond the power of the governor legally to oust him.

Here, then, we have the direct judgment of the Governor of California, in whom all the functions of the government were combined, on the exact question at issue here, and, with a full knowledge of all the facts, he decided that Peralta had an indefeasible estate in the whole rancho.

In Malarin's case, 1 Wall., p. 284, it was alleged that the grant had been changed from one to two leagues, and the district court decreed one league to the claimant, and this court decreed two. The testimony proved that the word "one" had been erased after the paper was drawn and signed, and the word "two" inserted.

The court held that the alteration, under the circumstances, amounted only to a redelivery of the grant.

In the present case, if the order of Governor Arguello, and the redelivery of possession under it, should not be deemed by this court what Arguello himself declares it to be, that is, merely a restitution of possession, in virtue of the previous grant, which he thereby declares to be still subsisting, but proceedings to extend the grant, even in that view no further steps would be necessary under the decision in Malarin's case. As the new pro-

ceedings are to be annexed to and form part of the existing expediente, they are only amendments of it, and not a new grant, and are to be treated as a redelivery of the old grant after being amended.

EFFECT OF TIME.

Sanchez vs. Gonzales, 11 Martin, 207.—A. D. 1822.

Plaintiff has no written evidence of title from Spanish government. A colony at Bayou LaFourche was made by authority of the Spanish government. Romano was one of the colonists, and Trudeau, the king's surveyor, measured out to each colonist his parcel of land, and the surveyor put Romano in possession of this land; the archives of Trudeau have been burned, and Romano possessed for sixteen years, until his death, and plaintiff is his only daughter. The first fact submitted by defendant relates to title, and finds it to be a concession by the Spanish government, and possession given by Trudeau.

From these facts some reliance is placed on a title in Romano by *prescription.* As a *general rule*, such title can not be acquired to public land. But it appears that the Spanish government has in some degree enacted an exception to such rule. The 1st law of the 12th title of the 4th book of the Recopilacion of the Indies provides that persons who have inhabited and cultivated for four years "shall have the right of disposing of them *as their own property.*"

The 14th law "requires that all possessors of land should exhibit titles, and that those who show good titles, or a just prescription, shall be protected therein."

"The 18th law admits persons who have possessed for ten years to compromise with the government for lands thus possessed."

"The sovereign power of a state or kingdom which holds public domain for the benefit of the whole community, is not restricted by *forms* as to the manner in

which it may assign or lay out any part thereof to an individual in full dominion of property. It is true that this is generally done by written titles, emanating from competent authority; but we are of opinion that it will not be in violation of any principle of natural law and equity and sound policy to say that when a part of the public domain is separated from the rest by metes and bounds, and an individual is put in possession of it as his own, he acquires title thereto; which is certainly much strengthened by a lapse of time so long as that, during which, it appears from the evidence, the father of the plaintiff possessed the tract of land in dispute."

"This being a *petitory* action, it is first necessary to inquire whether the plaintiffs have made out any *legal* title" (p. 178); and the court say: "We conclude that the appellees have shown a title in themselves" under Romano—(p. 179.) "It remains to see if the defendant has produced a better title." He has only shown prescription for an insufficient time.

"It is, moreover, the opinion of the court that the appellant would not be bettered by the certificate of confirmation of the land commissioners of the United States, were it admitted: first, because the certificate gives no right against individual claims; and, second, because it is believed that Romano acquired a title in his life-time, which descended to his heir."

This case recognized in LeBlanc vs. Victor, 3 La. R., 47.

Landry vs. Martin, 15 La., 1.

Plaintiff sues for back lands on a double Spanish concession and confirmation—original grant in 1777 to LeBlanc. In 1796 Peychaun, under LeBlanc, obtained the second or extended concession.

In 1779 defendant had the lands "allotted to them by metes and bounds, and surveyed by the king's surveyor general."

Held that defendant's title was best. "It has been

urged that the defendant has failed to show an *actual grant*, in writing, to any of the colonists. The Spanish government recognized verbal as well as written grants. The authority of Trudeau, the king's surveyor, is presumed, according to the decision of 12 Peters, 437. It is in evidence that the colonists were placed on their respective lots by the officers of the king; that his surveyor general surveyed each lot, and marked its metes and bounds; that the archives of the province were partially destroyed. * After such a long possession in the colonists, if a written grant were necessary, the evidence before us would authorize us to presume it."

These cases do not infer grants by the sovereign from mere possession of parts of the public domain, however long continued. This would be prescribing against the sovereign, which is inadmissible, under either the civil or common law. But as under the civil law intruders on the public domain were regarded with peculiar sternness, being denounced by the term "*usurpation*," used in reference to it by the courts and law writers, the possession of land, when shown to be duly authorized and long continued, under these laws implied a grant. In the Louisiana cases the presumption is, however, far less strong than in this case. There was shown the induction of parties into the possession of different tracts of land by the public officers who had power to give possession, but not title, and on this possession alone, and the fact that a portion of the archives were destroyed, a grant is inferred. Here the possession was given by order of the granting power itself, and at most nothing is wanting to its formal completeness but a "certifying document," which it may reasonably be supposed was given, if necessary, and to have been lost, for Ignacio applied to Micheltoreno in 1844 for a new title paper, on the ground that the document which secured his father the land had been mislaid, and Jimeno, the secretary, reports to the governor that the petitioner had satisfactorily established the fact that

this land had been granted to his father, and that he had occupied it for more than twenty years, and the governor directed a new title to be issued. The new title was not completed, but the proceedings to obtain it show that the existence of the old title had been proved conclusively to the authorities. They certify to that fact and that is sufficient.

BOUNDARIES.

The circuit court admitted that the grant of Sola of 18th October, 1822, which applied to the land between the San Leandro and the Temescal was complete in form, but nevertheless held it to be incomplete for the want of definite boundaries established by the grant itself or by the possession given by Martinez.

But as the bill of exceptions states that evidence was introduced tending to identify the natural objects referred to in the grant, and tending to establish the fact that the boundaries of it were the San Leandro on the south, southeast, and east; the Temescal on the north and northwest, and the bay on the west, it was a question for the jury to decide whether the boundaries claimed were established by the proof which the bill of exceptions says tend to establish them.

The circuit court also adopts the reasoning of the opinion of the supreme court of the state in Banks vs. Moreno, 39 Cal., p. 233, in which, after a review of *all the documents*, the court concludes that the grant was incomplete, because there was a total uncertainty not only as to the quantity granted, but as to the eastern boundary of the tract. But the counsel for defendants in error in his brief (p. 12) substantially admits that this objection is met by oral proof, which the bill of exceptions states tended to establish definite boundaries, thus making it a question for the jury.

In Banks vs. Moreno, 39 Cal., 233, the supreme court of that state receded from its opinion in Minturn

vs. Brower, with respect to the completeness of this title on the ground that there was "a total uncertainty as to the eastern boundary."

So far from that being true the petition itself fixes that boundary conclusively. It asks, in order to graze cattle, for a place on the bay between the San Leandro and the little hill on the sea-beach. This call for the San Leandro is all that is wanted to fix the eastern boundary. That creek heads on the mountain lying east from the bay, with a narrow valley half a league between it and the bay. The petition does not speak of the mountain, but as the creek which heads in the mountain is the boundary, and the creek is limited by the hill, it follows that the land is limited by the mountain on the east. The land asked for, therefore, lies between the creek so limited and a line in the valley at the north, which runs by the little hill.

The petition therefore presents a distinct outline of the tract asked for, with nothing undetermined, excepting only the direction of the northern line across the valley, which runs by "the little hill near the beach." This line is fixed by the officer who put Peralta in possession, in whose return it is described as "a rivulet which issues from the mountain range and runs along the foot of said small mountain of San Antonio." This line is settled and no objection is made to it now. So that the tract granted lies betwen the streams which head on the mountain on the east, and empty into the bay on the west. It follows necessarily that the eastern boundary is along "the mountain top," between the heads of these streams. Nor does it rest even on this necessary inference. It is expressly stated in Peralta's petition for repossession, in May, 1823. There he says that the land he claims lies between "the top of the mountain and the bay." And this paper is made part of the expediente, and the possession he claims in it is ordered to be restored to him. In his remonstrance of October, 1820, and in his return to Echandra also in 1827, that boundary is described in

equivalent terms as "the mountain," and "mountain range."

It must be observed, also, that the supposed insufficiency of the description of the eastern boundary is a new discovery. It was not made when the case was here before, although it is one which goes to the validity of the grant. Then objection was made to the northern boundary only. The answer of the court, however, is conclusive as to both objections. The court said that the testimony of the witnesses "who were present when the lines were established some thirty years ago, and have known these boundaries ever since," was competent evidence to fix them. The language is not restricted to any particular boundary. It applies equally to the eastern, which we offer to establish, as to the northern boundary, which was then alone supposed to be open to objection.

This court has thus declared in advance the sufficiency of the proof we offered below to meet the only objection made by the supreme court of the state to the completeness of our title.

If the documentary description, upon the deficiencies of which alone that court bases its opinion were, in fact, as deficient as that court assumes that they are, the title would, nevertheless, be perfect in virtue of the juridical possession given, the artificial land-marks fixed in the ground, and the natural objects designated by the officer in presence of the attending witnesses, reported by him, and still capable of identification. This court so decided when the case was here before; in effect declaring what it has often repeated since, (see among other cases Graham vs. U. S., 4 Wall., p. 261,) that the grant operated on the possession given to the party, the extent of which the officer was required to mark off (and reports he did mark off with four artificial land-marks in addition to the natural objects) in the presence of witnesses. This juridical possession conclusively defined the grant. There were no surveyors in the country, and the object of the

presence of the witnesses was to enable them to identify the lines and land-marks referred to in the report of the officer appointed to adjudge and decide upon them. To reject their testimony on these points is to reject the evidence appointed by the Spanish authorities, which this court has decided to be competent.

LEGISLATIVE CONSTRUCTION OF THE ACT OF '51.

This was conceded throughout protracted debate in Congress on this bill. At the outset of it, (see Cong. Globe, vol 25, p. 117,) on 23d December 1850, Mr. Ewing moved to strike out from the 7th section of Mr. Gwinn's bill the words "*ipso facto* revert to the public domain, saving for a time not exceeding —— years the rights of infants, femes coverts, and insane persons," and inserting the words "be treated as part of the public domain." "As it now stood," Mr. Ewing observed, "it says the land 'shall revert' to the public domain. This is what we cannot do. We cannot make the land that is vested revert to the public domain. The amendment was agreed to."

Mr. Gwinn, p. 57 of App., denies that this bill treats all land titles in California as incomplete, as charged by Col. Benton. He knew that many of them were legal titles, and he cited the Aredondo and Wiggins cases to show that such titles should be protected by this court, whether presented or not to the board. Senators Davis, of Massachusetts, Butler, of South Carolina, Ewing, of Ohio, Berrien, of Georgia, and the Judiciary Committee generally sustained Mr. Gwinn's views on this point in the debate. Col. Benton made many speeches against the bill, recurring continually to the provision that the land for which claims were not presented should be treated as public land.—(See App., pp. 48, 158, Globe, 362.) He did not, however, controvert the legal proposition that this provision of the law did not contemplate forfeiting the land. But he said, whilst lawyers and courts all agreed

that the treaty was the paramount law, and therefore that where there were vested rights in property, these rights would be protected by the courts without regard to any legislative action; yet he said the result of the law would nevertheless be forfeiture, because its practical operation would be to combine the government with speculators against the ignorant claimants.

Those familiar with the California land struggle, know the sad truth of this prediction, and have witnessed many painful illustrations of the old senator's wisdom. But there has been no case more strikingly illustrative of it than this.

Here the express decision of this court itself, as to the character of the title, is overruled by the local courts, state and national, by the influences he pointed out, as is apparent from the record. The multitude of the parties defendant explains it all. And this case shows that such influences need but the pretext of such a statute to enable them to set at defiance the highest authorities and to protect fraud of the grossest character, and in relations which make it particularly revolting, by brothers upon sisters and sister's children.

EJECTMENT ON THE MEXICAN POSSESSION.

The next question is, whether this action cannot be maintained, even on the assumption that the grant is incomplete, in virtue of the right of possession. If the defendants are trespassers or intruders, plaintiffs' title is sufficient; one who ousts his co-tenant is equally a trespasser as if he were a stranger to the title. If, therefore, plaintiffs have not been divested of their right, and defendants have not acquired it by the confirmation, there is no difficulty in maintaining this action, although the title is incomplete. The authorities are full and explicit to this effect. Thus it is decided to be only necessary, in the first instance, to deduce title from one who

died seized.—(West vs. Pine, 4 W. C. C., 691.) It is enough for the plaintiff in ejectment to show a right of possession.—(Hylton vs. Brown, 1 W. C. C., 204.) If the plaintiff shows twenty years' possession, or the seizin of his ancestor, and a descent cast, it is a sufficient *prima facie* case.—(Ib.) The plaintiff's prior peaceable possession is sufficient to enable him to recover against a mere intruder without title, and the latter cannot set up an outstanding title in a third person.—(Christy vs. Scott, 14 How., 282; Christy vs. Findly, ib., 296.)

It is not necessary, in ejectment, to show title out of the commonwealth, where both plaintiff and defendants claim under a common ancestor who died seized.—(Patten vs. Goldsborough, 9 Serg. & R., 47, 56.)

Tilghman, Chief Justice, says, in Woods vs. Lane, 2 S. & R., 53, 57, "A naked possession is good title to recover in ejectment against one who puts me out of possession, and can show no better title than mine."

Allen vs. Lyons, 2 Wash. C. C., 475. "The case of Hylton vs. Brown is express that, in an ejectment against other than the proprietor, or one claiming under him, it is not necessary to show the title out of him, if a right of entry is proved."

In ejectment by one devisee against another devisee evidence is not admissible to dispute the original title of the testator under whom both claimed.

Seckle vs. Engle, 2 Rawle., 68; Bryer vs. Smith, 3 Watts, 449, says, in ejectment against one who had been a tenant of the plaintiff, before the defendant will be permitted to give evidence of a *title different* from that of him who had been his landlord, he must prove that he quitted and fairly gave up the possession of the premises to the lessor, and offered him time to go and repossess himself.

1 Washburn on Real Property, 430, ch. 13, says: "Although each of several tenants in common has a several freehold, yet the interests of all are so far identical, and each is so far regarded as acting for the others in regard

to the estate, that if there were an outstanding adverse title, no one of them before partition could, by purchasing it in, use it against his co-tenants, if they were willing to contribute pro rata towards reimbursing him the moneys he may have had to pay to acquire such title." * And p. 432, div. 17, says: "Applying this common law duty of co-tenants to aid each other in protecting what had become a common estate, the law holds it incompatible with their duty towards each other, for either to become the demandant in a suit to recover any portion of the land by a paramount title, and thus to place himself in antagonism to his co-tenants." The same general principles are recognized by Mr. Justice Miller, in Rothwell vs. Dewees, 2 Black, 613. The defendants are estopped from denying the plaintiff the legal right of possession under the grant to their common ancestor.

4TH PROPOSITION.

No change of title to said lands has ever been made so far as the United States and the Mexican grantees are concerned; if the legal title vested in the United States, no patent has issued to pass it to the representatives of the Mexican grantee, and the confirmation does not pass it. It is well settled that by mere legal intendment, the plaintiff is beneficial owner of the same interest in the title under the confirmation that he owns under the Mexican title.

By the confirmation the United States recognizes the validity of the title given by Mexico, and thereby acknowledges that so much of the soil is no part of the public lands. So far as the foreign title has gone, it stands by its original validity and force, and it receives no new or additional force or legal effect from the United States. Therefore, a possession of a specific tract, by metes and bounds, as in this case given by Mexico, is valid here under the confirmation, because it was valid against

Mexico. The plaintiff received a legal possession prior in time to the jurisdiction of the United States, and *adverse* to it. He has received no possession from the United States, nor has the government sought to disturb him.

As stated by Mr. Justice Field, in Leese vs. Clark, 20 Cal., 387, 421: "The acquisition of California by the United States did not affect the rights of the inhabitants to their property. They retained all such rights and were entitled by the law of nations to protection in them to the same extent as under the former government. * In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away. It is, therefore, of no moment whether the title which passed to the plaintiff by the Mexican government be regarded as perfect or imperfect, it constituted property, and as such the obligation to protect it was cast upon the United States. * Legal titles, such as were perfect under the former government, did not need any action of the new government for their protection. * The new government succeeded to the obligations of the former government with respect to the property claimed."

In The United States vs. Clark, 8 Pet., 436, 444, Mr. Chief Justice Marshall says: "Florida contained an immense quantity of vacant land which the *United States* desired to sell. Numerous tracts to an amount not ascertained had been granted by its former sovereigns, and confirmed by treaty. To avoid any conflict between these titles and those which might be acquired under the *United States*, it was necessary to ascertain their validity and the location of the lands. For this purpose boards of commissioners were appointed with extensive powers, and great progress was made in the adjustment of claims. But neither the law of nations or the faith of the United States could justify the legislature in authorizing these boards to annul pre-existing titles, which might *conse-*

quently be asserted in the ordinary courts of the country against any grantee of the American government." "These titles are to be held valid to the same extent as if the territories had not been ceded."—(Id., 451.)

On page 453 is shown the desire of Spain to make such grants to secure the settlement of the country, and the powers of the governors to grant.

In The United States vs. Perchman, 7 Pet., 51, 86, Mr. Chief Justice Marshall says: "It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be confiscated and private rights annulled. The people change their allegiance; their relations to their sovereign is dissolved, but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory. Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government *would have been unaffected* by the change. It would have remained the same as under the ancient sovereign. * * A cession of territory is never understood to be a cession of the property belonging to the inhabitants. The king cedes only that which belongs to him. Lands he had previously granted were not his to cede. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world."—(87.) The claim for confirmation in that case was based upon the language of the treaty, and the court say, whether so or not, yet independent of the treaty the former rights must

be protected; thus, "*without it*, (the treaty clause,) the titles of individuals would remain as valid under the new government as they were under the old, and those titles, *so far at least as they were consummate*, might be asserted in the courts of the *United States* independently of this article."—(p. 88.)

The language of the treaty with Mexico is this: "In the said territories property of every kind now belonging to Mexicans, not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States."—(Article 8, 9 Statues, 929; see also Article 10.)

Under the act of March 3, 1851, sec. 8, 9 Statutes, p. 631, claims were to be presented for confirmation, and the commissioners were required "to decide upon the validity of the claim." Claimants were to show their derivative title, otherwise there would be no *prima facie* case in favor of the claimant, for it was provided in section 15, that the confirmation and patent issued to the claimant shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons.

What is the precise effect of the confirmation of a Mexican grant?

First, the United States may *decide* that it is invalid, *tested by the laws of Mexico*. Thereupon, *ipso facto*, the lands belong to the public domain, because the United States received them by unincumbered title. Its title does not spring from the act of 1851, but the proceedings under that act are final evidence of title under the treaty, derived from the *State* of Mexico.

Again, the United States may decide that the grant is valid. This is final evidence against the United States to the effect that, by the treaty, the land did not become part of the public domain. Why not? Because it had

been conveyed to a third person before the United States purchased. There was an adverse title in existence before any rights of the United States attached. The prior grant, if valid against the *prior* sovereign, is, *by its own force*, final against the new sovereign. Why by its own force? Because the United States has no power over the completed and valid act of the Mexican government. The grant is the act of Mexico. When the United States acknowledges it valid, it acknowledges that a state of facts has existed for years past. This acknowledgment, *ipso facto*, annihilates its power of disposal of the lands as public lands. The power of the government over the public lands is unlimited because sovereign. But lands can not be private, in part, by virtue of a Mexican grant of many years standing, which is binding on the United States; and public, in part, because the mere words of the act of 1851 may so declare. The grant, if valid, is binding upon the United States just as much so as its own patent would be. It is declared *valid* in 1851 under act of Congress, *of its own force;* therefore that same act cannot declare the government released from its binding effect.

This want of power in the United States to make disposition of lands, as it can do in case of public lands, is asserted in Minturn vs. Brower, 24 Cal., 644; Reichart vs. Felps, 33 Ill., 433, and affirmed in 6 Wallace, 160, and other cases below abstracted.

In the case of Reichart vs. Felps, 33 Ill., 433, the United States had conveyed certain lands by patent to the plaintiffs as part of the public lands, and suits on these patents. The defence was that the United States had never acquired the title and power of conveying the lands, although it had acquired the sovereign power of determining where the title was. The lands were a part of the Northwest Territory ceded by Virginia to the United States under agreement that the United States would confirm the title of the inhabitants, and it did so, but by *informal* act, which could not operate as a deed. The

question, therefore, was as to the *legal effect* of this informal act upon the title to this reserved portion of the public lands. These lands were not reserved by description, but only, as in the case at bar, by ascertainment of facts.

The Supreme Court of Illinois held that the Virginia title was protected by the agreement of the United States to confirm it, so that it was considered as never actually passing, and therefore it was immaterial that the document which cofirmed it was not executed as a formal conveyance. "The question for us to determine is, what is the effect of the governor's confirmation. * * Any written evidence, if it amounted to no more than an entry made by him in a memorandum book, of his act of confirmation, would have been a sufficient execution of the power under the law. * * It was not a grant by the United States, because the title was not in them. One of the objects of the acts of Congress was to ascertain the public lands, to find out what portion of the domain ceded by Virginia passed by the cession, and that was easily ascertained by first establishing the claims of the settlers; the residuum only belonged to the government." Therefore the subsequent patents of the United States passed no title to the plaintiffs.

In reviewing this case, in 6 Wallace, 160, 165, Mr. Justice Grier says: "The objection that the patent from the governor was without seal, ought not to have been made. Any written evidence of his confirmation would have been a sufficient execution of the power. All that was necessary was an authentic declaration by the United States, through their authorized agent, that they had no claim to the land. *It was not a grant by* the United States, because the title was not in them. Congress is bound to regard the public treaties, and it had no power to organize a board of revision to nullify titles confirmed many years before by the authorized agents of the government."

The terms on which the United States accepted the

grant was, "that the French and Canadian inhabitants and other settlers, &c., shall have their possessions and titles confirmed to them and be protected in the enjoyment of their rights and liberties."

Congress having become dissatisfied with what the governor of the territory had done, in recognizing these guaranteed rights, on February 20, 1812, passed an act to dispose of the lands, under which the patents issued to the plaintiffs were issued.

The facts and principles of this case are much more fully set out in the case of Doe vs. Hill, Breese R., 236.

It cannot be denied that the legal title to the lands all passed to the government in that case. But it was a bare legal title as to these lands. Therefore, when by the tribunal that Congress first authorized to ascertain what lands it ought to guarantee to the settlers, it was ascertained and determined that the lands in question were of that protected class it was held that *in law* such ascertainment operated to confer title.

In Papin vs. Massey, 27 Mo., 445, there was a grant to Mackay. It had been rejected by the board of commissioners in 1809, and by act of 26th May, 1824, was barred. —(p. 449.) In 1819 Mackay mortgaged fourteen thirtieths to Delassus of this unconfirmed grant as it then stood barred.

In 1832 Congress passed an act under which the claim could be presented again for confirmation, and it was done by Mackay's *heirs*, and they "produced new testimony in support of their claim."—(449.) Delassus did nothing. In 1836 the claim was confirmed to Mackay's representatives. James Mackay being dead, and Delassus not having foreclosed his mortgage, the heirs were the true legal representatives.

After the confirmation in 1836, the mortgage was foreclosed, and the purchasers sued in partition, claiming that the legal title granted in 1836 to the heirs upon the

foreclosure many years afterwards passed to the purchasers.

The court say: "The turning point in this case is as to the *enurement of the confirmation*," and they hold that it enured according to the *actual* ownership of the original grant, and not according to the claim.

On writ of error to this court, in 24 How., 362, the court say: "James Mackay had died and his heirs presented the claim the second time, and it is insisted that the confirmation *to them* by the act of 1836 rejected the mortgage of Delassus. * The grant of the lands *to the heirs*, by the act of 1836, carried the equities of the mortgagee *with the legal title*, of which he took the benefit." It will be observed that when the confirmation was made in 1836 it was necessarily to Mackay's *heirs*, and not to Delassus, for he had not foreclosed his mortgage. And such titled vested in the heirs from 1836 for years, when the Delassus mortgage was foreclosed, which, as stated by this court, was, *in form*, not of a legal conveyance, but a mere equitable mortgage.

The principle of this case is this: that the confirmation fastens upon the original title and *enures* by mere operation of law, according to the equitable ownership. It may be proper to state that the confirmation of 1836 passed the legal title, and not a mere equity.

In Magwire vs. Tyler, 40 Mo., 406, at p. 421, the counsel insist that the confirmation to Brazeau was ineffectual, because he had failed to present his claim for confirmation, as required by act of Congress, which says that claims not presented shall be void. An elaborate argument is made on this point, (p. 421–4,) citing the act, which reads: "That if any person shall fail to deliver such notice, or cause to be recorded such written evidence of his claim, all his rights under the act shall be void and forever barred."

Brazeau not only gave no notice of claim, but he presented no proof, and his case was acted upon on evidence

furnished by the adverse claimant, La Beaume; and the court, p. 434, sustains this point, saying: "It does not appear that any claim had been filed or presented to the board, nor that any evidence of the claim had been recorded, in the name of Brazeau."

The case is reversed in Magwire vs. Tyler, 8 Wall., 650. At 668 the court declare the ruling of the court below on this point unsound, and hold that the confirmation enures to the benefit of Brazeau, notwithstanding his neglect to file the claim.

In Hogan vs. Page, 32 Mo., 68, Louis Lemonde files notice that he claims the land "formerly the property of Mr. Conde."

The entry before the commissioners is this: "Louis Lemonde, assignee of Auguste Conde, claiming, &c. The confirmation is made under act of March 3, 1807, to the representatives of Conde." The plaintiff held Lemonde's title, and based his right to recover upon the ground that Lemonde made the claim, and therefore the confirmation enured to him. The court decided against him, saying, "to entitle the plaintiff to recover he must show title in himself." The case was brought to this court, (see Hogan vs. Page, 2 Wall., 605,) and was reversed because the lower court decided, "as a matter of law, that the plaintiff was not entitled to recover." But this court agreed with the lower court in holding that Lemonde must prove derivative title from Conde.

This confirmation was made under act of March 3, 1807, 2 Statutes, 440, the 5th section of which provided that the time for giving notices of claims should be extended to July 1, 1808, "but the rights of such persons as shall neglect so doing within the time limited by this act shall, so far as they are derived from any act of Congress, ever after be barred and become void, and the evidences of their claims never after admitted as evidence in any court of law or equity whatever."

The first act of March 2, 1805, 2 Stats., 326, sec. 4, pro-

vides for the *notice* of claim by any person claiming lands under the former government, and adds: "and shall also, on or before that day, deliver to the register or recorder, for the purpose of being recorded, *every grant, order of survey, deed, conveyance, or other written evidence of his claim.* * * And if such person shall neglect to deliver such notice in writing of his claim, * * all his right, so far as the same is derived from the two first sections of this act, shall become void and forever thereafter be barred."

The confirmation on the notice and claim of Lemonde under these acts was held, in the above case of Hogan vs. Page, not to be evidence in favor of the claimant, unless the proof of derivative title was sufficient in law; and the claimant was also at liberty, on the trial, to give evidence showing that he had the derivative title from the original grantee. Both the Supreme Court of Missouri and this court hold such derivative title must be proved as a fact, *in pais*, on the trial.

In Mercier vs. Letcher, 22 Mo., 66, one *Courtois* claimed and proved a grant to *Mercier*. In 1810 the confirmation was made in the name of the *original grantee*, who was then dead.

The court say: "This confirmation did not enure to Courtois. He had married the widow of the grantee, and thereby claimed as his representative. * * What is it that is confirmed? It is the *original right* which had been made by the Spanish authorities to Mercier. The board of commissioners did not make grants; they had no power to grant. They were to decide upon grants theretofore made by the French and Spanish authorities; and, when they decide and confirm the grant, they confirm the original grant as it was made. They thereby decide that then, 1810, this grant is a valid title against the United States, * and it must, *by operation of law*, be good in favor of those who have, by law, the right to claim it under Mercier, either as grantees, devisees, or

heirs." Had not Courtois claimed the land under the act of Congress the Mercier grant would have became extinct; yet, when confirmed, it stands with its original force and unchanged. This was under said acts of Congress of 1805 and 1807, above set out.

The decisions in Louisiana are to the same effect. They hold that the confirmation operates as a mere acknowledgment by the government, and decides nothing on any question of title arising between individuals.

Sacket vs. Hooper, 3 La. R., 104, for land both parties claimed under McLaughlin; confirmation was to Wiley, who claimed under McLaughlin; certificate of confirmation was May, 1811, and Wiley, in his notice before the commissioners, says he purchased of McLaughlin.

Plaintiff claims by deed from McLaughlin; if his claim was not transferred to Wiley, plaintiff must recover, for the confirmation must *enure* to the benefit of the person having the inchoate title.

But we think Wiley, by parol sale, got the title, which he thinks valid under the laws of Spain; cites Sanchez vs. Gonzales, 11 Martin, 212.

Bradley vs. Colvert, 5 Martin, La., 663.

Plaintiff claims under Clayton, who held under incomplete Spanish title.

Defendant in possession sets up title under Clayton, by deed from Bradley, who filed the claim for confirmation, and got the certificate confirming his title. "It is the opinion of this court that the effect of the certificate does not alter the rights which may have been acquired under the former government, and which must be decided on, *between individuals*, according to the laws and regulations of said government; viewed in this manner the certificate obtained by J. Bradley is nothing more than a confirmation of Clayton's title, and must accrue to the benefit of persons claiming under him, by legal and bona fide contracts." "It is a general rule that in all *petitory* actions for the recovery of property the plaintiff must recover on

the strength of his own title." They can "claim nothing under the certificate of the commissioners of the United States, except in conformity with and supported by Clayton's title."

Carmichael vs. Brisler, 8 Martin, La. R., 727, A. D. 1820.

Plaintiff sued on plat of survey and a grant or permission of the Spanish *commandant* to occupy the land, and a confirmation of his claim by the land commissioners.

Defendants had actual possession and a confirmation.

Held that as Vidal, the Spanish commandant, had no right to grant the land under the regulations of his government, the plaintiff acquired no title by the grant. "The confirmation of his claim by the commissioners had the effect of perfecting his title against the general government, but leaves it to its original value when placed in opposition to the claim and title of an individual." Defendant holds under a settlement, right, and confirmation. "We are of opinion that his possession, under the certificate, is a title at least equal, if not better than that of plaintiff, who ought not to recover."—(8 Martin, 727.)

In Wilson vs. Castro, 31 Cal., 420, the evidence showed a Mexican grant to Buelna for four leagues within a larger area, and therefore not a specific tract.

Buelna died leaving a widow, who took no interest, and a brother and sister who were his heirs. The claim for confirmation was presented by the widow, and the patent followed.

Then Buelna's heirs sued in equity to divest the legal estate. It was held that by mere operation of law, the confirmation was for the use of the real owners, and that notwithstanding the failure of the heirs to present the claim, the confirmation enured to their use; that the original grant was in effect confirmed, and the plaintiffs were entitled to a decree.

In Minturn vs. Brewer, 24 Cal., 644, ejectment was brought upon the Peralta grant here in question, a portion of which had been surveyed, by one of the heirs

who had presented it and obtained the confirmation; and the defendants represented other heirs who had not presented their claim. It was conceded by the plaintiff that the original grant gave a complete title, but he maintained that the defendants could not rely upon it for the reason that the act of 1851 divested them of all benefit of it. The court held that such was not the meaning of the act, and to so construe it would make it unconstitutional; that these lands do not fall within the provision of the Constitution conferring the power on Congress to dispose of public lands.—(p. 664.) They say there is a marked distinction between a mere equity, as was the case in Estrada vs. Murphy, 19 Cal., 269, where Mr. Justice Field was speaking only of an indefinite grant for quantity, within a larger area, and show that case not to be in conflict with this decision.

"This documentary evidence is the same that was before the supreme court in Peralta's case, 19 How., 344, and is conceded to establish that the title of Louis Peralta was a grant in fee to a specific tract of land."—(657.) Such evidence was "set forth in the record of that case," and consequently the court must have regarded it as establishing such a complete title.—(p. 657,) With the evidence spread upon the record, it would not have held it to prove a complete grant, on the admission of counsel as to its *legal effect.* Admissions cannot supply the court with conclusions of law.—(*Id.*)

In Banks vs. Moreno, 39 Cal., 233, 246, the court decide that the Peralta title is not complete, because the description of the land is a nullity. This would make the confirmation void, equally and for the same reason. It therefore stands directly in conflict with United States vs. Peralta, 19 How. It cites Estrada vs. Murphy, 19 Cal., 248, as a precedent, which shows that the court was treating the Peralta grant as indefinite and defective, in not locating or defining the subject of the grant. Estrada vs. Murphy was dealing with a grant of four leagues to

be located within a larger area, and the difference in the facts of that case and this makes the principle there recognized entirely inapplicable here. And, moreover, such unlocated Spanish title was held by Mr. Justice Field to be inferior to the opposing title perfected by a patent. Banks vs. Moreno, *supra*, is also in conflict with the following cases.

In Ferris vs. Coover, 10 Cal., 589, 622, the court say: "Whether or not the premises are included within the grant, is a question of fact to be submitted to the jury, and the only question for this court to consider is, whether the parol testimony in explanation of the boundaries and to fix the location of the land granted was admissible."

Cites Page vs. Scheibel, 11 Mo., 187; Conn. v. Penn., 1 Pet. C. C., 511; Clanman vs. Carlton, 2 N. Hamp., 378; U. S. vs. Sutherland, 19 H., 364; McIver vs. Walker, 9 Cranch, 173; Norwood vs. Byrd, 1 Richardson, 135.

In Cavazos vs. Treving, 6 Wall., 773, held that it was for the jury to determine the extent and location of a Spanish grant on the evidence, and that the acts of the parties when taking possession are entitled to much weight.

5TH PROPOSITION.

Under the Spanish and Mexican governments there was a legal and full right of possession immediately conferred by the government upon making a grant; this was a part of the law of the land which has been recognized by the courts of the State of California, and existed, whether the grant was complete or inchoate. Whether complete or not, so long as it remains unimpaired it will support a legal action for the recovery of the possession.

Such right of Mexican origin and completeness, so far as it was a legal right and available in the courts of the country, remains intact and unimpaired by the act of March 3, 1851, and any proceedings had thereunder. Those *proceedings* are to confirm and make effect-

ive certain incomplete rights, and of themselves impair no perfect rights.

This was held in Ferris vs. Coover, 10 Cal., 589. Mr. Chief Justice Field decided that under the former government the grantee was entitled to the possession of the land, under his grant. To avoid a denouncement and possible forfeiture of his estate, he was required to occupy the land, and its possession was his right, which could have been enforced. It was a right to the use and enjoyment of the property, and as such was guaranteed by the treaty. It accompanied his grant, and like any other right of property, may be enforced in our courts. The action of ejectment will lie directly upon the grant.

In Riley vs. Hirsch, 18 Cal., 198, Mr. Chief Justice Field holds that under the United States the grant was entitled "to the same effect which was attached to it by the Mexican authorities in California."

"The grant itself gave a right of possession, and the colonization law made such possession a duty." * * "Carrying with it *the right of possession*, it is sufficient to support ejectment." "The action is merely for the possession; it determines no rights but those of present possession."—(See 5 Wallace, 829.)

Vanderslice vs. Hanks, 3 Cal., 27. Ejectment lies on a grant by Micheltorena. It specified the lands and vested a complete title, and is to be treated by the Mexican laws in force. The *grant* by the governor is presumptive evidence that all pre-requisites had been complied with. P. 41; here the land is described by *specific boundaries.*

Seale vs. Ford, 29 Cal., 104, (1865,) by Sawyer, J. Plaintiff has had a confirmation and a *confirmed* survey, and this is equivalent to a patent under act of Congress of 1860.

"He has, therefore, made out a title which can only be defeated by an elder grant from the Mexican government, which covers the same lands. And the older title must be a perfect title that did not require presentation to, and confirmation by, the Board of Land Commis-

sioners, or, at least, it must be under a grant by *specific boundaries* which could not be modified by the government of the United States, and not a grant of a specific quantity within larger boundaries."

This case approves Minturn vs. Brower, 24 Cal., 644.

In Houghton vs. Jones, 1 Wall., 702, in ejectment the plaintiff relied upon a Mexican grant and made no proof that it had been confirmed, and the objection was made that, therefore, it was inadmissible in evidence. This court ruled that such objection could not be made here when the record does not show that it was made below. —(See Sheirburn vs. Cordova, 24 How., 423.)

The principle that the United States courts will administer the written and unwritten laws of every state by appropriate action, is one of constant practice, as illustrated by the following cases.

In Fitch vs. Creighton, 24 How., 159, a lien was given by a statute of Ohio, in certain proceedings to improve the streets of their towns, &c; held that proceedings could be had in the circuit court of the United States to enforce the law on behalf of a citizen of another state.

In ex-parte Biddle, 2 Mason, 472, Mr. Justice Story applied the remedy given by the state practice for the partition of lands, saying:

"I have bestowed a good deal of reflection upon this subject, and am satisfied that parties entitled to sue in the courts of the United States are in general entitled to pursue in such courts all the remedies for the vindication of their rights, which the local laws of the state authorize to be pursued in its own courts. * * The whole structure of our judicial establishment manifestly contemplates, that in cases within the reach of their jurisdiction, the courts of the United States are to administer the same remedial justice that would be administered in the proper state courts."—(See Robinson vs. Campbell, 3 Wheat., 212.)

In Sears vs. Eastburn, 10 How., 187, the point was as to the practice of the United States circuit court in Ala-

bama, for the recovery of land. "In 1821 an act was passed by the legislature of that state to abolish fictitious proceedings in ejectment and to substitute in their place the action of trespass for the purpose of trying the title to lands, and recovering the possession." A suit corresponding to this was brought, and a motion was made to dismiss it on the ground that the law of the state was not in force in the circuit court of the United States. The court held that the state law was adopted by the act of 1828. This act of 1828, by act of August 1, 1842, (1 Brightly Dig., 749, sec. 13,) is extended to all states admitted up to that time, and made applicable to California by act of March 2, 1855, and 23d April, 1856.—(Brightly Dig., 106, secs. 4, and 107, sec. 12.)

In Hardy vs. Johnson, 1 Wall., 371, held that in ejectment in the Circuit Court of California, the state practice having been adopted, the defendant having shown no title it was only necessary for the plaintiff "to establish any interest in the premises which gave him a right of possession. The action of ejectment determines no rights but those of present possession."

In 4 Wall., 196, Christy vs. Pridgeon, the court adopts the ruling of the state court of Texas as furnishing the rule upon a *Mexican law* applicable "to titles to lands in that state." "The interpretation (of the former Mexican law) within the jurisdiction of one state becomes a part of the law of that state, as much so as if incorporated into the body of it by the legislature."—(By Field, J.)

A prior possession is sufficient evidence of title to maintain ejectment against a mere intruder and trespasser.—(Id., 202.)

The legal rights of the owners of these Mexican titles do not originate in the legislation of Congress, and existed long before the act of May 3, 1851. They are based, in part, on the unwritten law of the country, and comprise a part of the common law of the state, and are obligatory upon the United States, as other laws are which constitute rules of property within a state.

In Fremont's case, 17 How, 542, 557, the court say: "The laws of these territories, under which titles were claimed, have never been treated by the court as foreign laws. It was always held that the court was bound judicially to notice them, as much so as the laws of a state. In doing this, however, it was undoubtedly often necessary to inquire into the official customs, and forms, and usages. They constitute what may be called the common or unwritten law of every civilized country." "And in deciding upon the validity of a Mexican grant the court could not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities. It is the duty of the court to protect rights obtained under them, *which would have been regarded as vested and valid by the Mexican authorities.*"—(Id., 561–2.)

In Beard vs. Federy, 3 Wall., 478, 488, the title confirmed was objected to "because it did not rest upon any direct grant or concession in writing." To which the court answered: "It is sufficient that the right or title is derived from the Spanish or Mexican government, and it may, in some instances, rest on the *general law of the land*, as is the case usually with the title of municipal bodies, under the Spanish or Mexican systems, to the common lands."—(p. 489.)

In Murray's Lessee vs. Hoboken Co., 18 How., 272, Mr. Justice Curtis sustained the validity of an act of Congress giving a summary remedy to the United States for the collection of revenue, upon the general law of the land, saying: "We must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them *after* the settlement of this country."—(277.) And he shows that in the states, after the Constitution was adopted, a similar general system prevailed. And

the conclusion is that such principles became a part of the jurisprudence of the United States.

Conclusion.

The question in this case is, whether a tenant in common of a tract of land which was granted by the Mexican government in 1820 to the common ancestor, and was possessed and owned by him from that time until his decease, in 1850, when the title and possession descended to the heirs of the original grantee; and who has been ousted by his co-tenant of this possession; can maintain an action at law to recover his share of the possession from such co-tenant, after the co-tenant has, in his own name, presented the original grant for confirmation, under act of Congress of March 3, 1851; it being admitted that, notwithstanding the confirmation of one tenant in common, the beneficial ownership is in all the heirs.

PROPOSITIONS.

1st. The land in question was granted in 1820 by the Mexican government to Luis Peralta, under which grant he rightfully entered into possession, and died possessed, claiming to own the same, in August, 1851.

2d. On his decease intestate, the land, by the same title and the possession, vested in the heirs-at-law of Luis Peralta.

3d. The possession was rightful on and after July 7, 1846, when the sovereignty of Mexico ceased and was succeeded by that of the United States.

4th. No change of title to said lands has ever been made; if the legal title vested in the United States no patent has ever issued to pass it to representatives of the Mexican grantee; and the confirmation does not pass it; and it cannot be denied, that by mere construction of law, the plaintiff is beneficial owner of his original share of the title represented by the confirmation.

5th. Therefore plaintiff was rightfully in possession of his original undivided interest in the land, under the same laws which authorized such possession, and which laws have never been repealed or suspended, when the defendant intruded upon him and ousted him unlawfully.

For this unlawful intrusion a remedy exists by the law of the land, and the plaintiff being a citizen of New York is entitled to such remedy in the federal courts.

6th. There is no question of federal law arising on the title as here presented, for neither party has a right of possession by virtue of title derived from the United States.—(New Orleans vs. Armas, 9 Pet., 223.)

This court takes jurisdiction because the action is between citizens of different states, under the judiciary act.

M. BLAIR,
F. A. DICK,
Of Counsel for Plaintiff in Error.

March, 1872.

IN THE

Supreme Court of the United States.

No. 159.—December Term, 1871.

REUBEN S. CARPENTIER, Plaintiff in Error,

vs.

Z. MONTGOMERY AND OTHERS.

Supplement to Brief of Plaintiff in Error.

PLAINTIFF'S POSSESSION ADVERSE TO, AND NOT UNDER, THE UNITED STATES.

The only objection to the plaintiff's right of action is, it is not proved that the legal title to the lands has passed from the United States *by patent.*

To this it may be answered:

That while the patent is conclusive on the right of possession of lands shown to belong to the United States, or where both parties claim under title *originating* in United States laws, yet, if it appears that the land never was the property of the United States, and that the claimant relies upon a valid title older than that of the United States, emanating from their common vendor, in such case a possession derived from such common vendor is rightful against the United States, and is entitled to recognition and protection by every department of the government.

There is a distinction between unpatented titles to the public lands, which are the property of the United States, to be disposed of as Congress may choose to direct by law, and unpatented titles to lands which never became any part of the body of public lands, subject to sale or donation by Congress; and this distinction does not arise from the greater or less power, but from the absolute ownership in the one case, and total absence of it in the other.—(Reichart vs. Felps, 6 Wall., 160.)

If Congress has no ownership in this land is not its *possession* by the grantees of the former government an absolute, unqualified legal right, *adverse* to the government, and because adverse to it, *protected by its laws* like that of all other owners?

1st. If the Mexican grant is valid, and under it possession is given of a specific tract, no subsequent patent to the grantee, or to a stranger, can take away the right of possession existing.

2d. If the existing location is a part of the grantee's right, and has been fixed by act of the former government, with determined metes and bounds, it is competent for such grantee to prove these facts; otherwise the acts of the former government are of no avail to him.

3d. The right of the United States to designate the land by survey is not to be so construed as to impair the existing rights of private property; otherwise the grant would be rendered, *pro tanto*, of no value.

4th. If the grant and the facts under it cannot be used in evidence in the courts it is of no value in itself.

THE PATENT.

The patent is evidence of only such title as the government possessed. If the lands are conveyed as part of the public domain, and the defendant, claiming adversely to the patent, claims under other title as part of the public domain, then the patent is conclusive as a grant of title; but if the lands are not part of the public domain, and

the patent is given by Congress only in fulfilment of its public obligation to confirm a pre-existing foreign title, then the patent should not be construed so as to impair or invalidate any prior, valid possessory title.

In New Orleans vs. De Armas, 9 Pet., 224, plaintiff claimed title under a Spanish permission to enter, which had been confirmed by the United States and a patent issued thereon. The city of New Orleans claimed the lot as part of the *quay*, denying the right of the Spanish governor to grant any part of it for private use. The state courts of Louisiana decided in favor of the plaintiff, and the case was brought up under the 25th section of the judiciary act, and a motion to dismiss made on the ground that the questions in the case were upon titles originating under the former government, and that the patent of the United States was not decisive on the title. *Mr. Clay*, in support of the motion, urged that "the property was granted before the treaty to Bertrand, and is now in the grantees of his heirs under the Spanish grants." "The title of plaintiffs originated during the existence of the right of the Spanish crown to Louisiana, and was afterwards confirmed by patent from the United States." "Thus both parties claim under the Spanish crown, and assert their rights as having existed prior to the treaty." (230–1.)

On the other hand it was urged by *Mr. Webster* that "the claim of the plaintiffs below was founded on a patent from the United States, and the state court held it valid. Thus their whole title depends upon the validity of the patent."—(232.)

Mr. Chief Justice Marshall says "the controversy in the state court was between two titles, the one originating under the French, and the other under the Spanish government. It is true the successful party had obtained a patent from the United States, acknowledging the validity of his previous incomplete title under the king of Spain. But this patent did not profess to destroy any

previous-existing title, nor could it so operate. It appears that the patent was issued in pursuance of the act of May 11, 1820, for the adjustment of land claims. That act confirms the titles to which it applies *against any claim* on the part of the United States. The title of the city of New Orleans could not be affected by this confirmation; but, independent of this act, it is a principle applicable to every grant—that it cannot affect pre-existing titles. The judgment of the state court depended on * * the *legal rights of the parties* under the crowns of France and Spain. The case involves no principle on which this court could take jurisdiction which would not apply to all controversies respecting titles originating before the cession of Louisiana to the United States."—(See Boggs vs. Mining Co., 3 Wall., 304.)

In the United States vs. Arredondo, 6 Pet., 691, 736, the court say: "The United States do not come into court claiming this cession (of territory) and renunciation as vesting them with the whole territory, in full dominion, in their sovereign capacity, with liberty to confirm previous appropriations of parts of it, or not, at their pleasure; but require us to finally decide between them and the claimants, as grantees from the same grantor, which grant carries the title to the land. Thus deciding between the parties on these articles of the treaty, we should be of opinion that the land embraced in the grant was no longer a part of the royal domain at the date of the treaty, but private property—land not vacant, but appropriated by a prior valid deed."

In New Orleans vs. The United States, 10 Pet., 662, 731, the court say: "It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of a right in the power which issued it. On its face it is conclusive and can not be controverted, but if the thing granted was not in the grantor, no right passes to the grantee. A grant has been frequently issued by the United States for land which had been previously granted, and the

second grant has been held to be inoperative. And in a case recently decided by this court, where the government had granted land in the State of Ohio, as land belonging to the United States, which was found to be within the Virginia reservation in that state, to satisfy certain military claims, it was held that the title did not pass under the grant."—(See particularly U. S. vs. Arredondo, 6 Pet., 691, at pp. 738–9.)

PECULIAR STATE REMEDIES IN U. S. COURTS.

Robinson vs. Campbell, 3 Wheat., 212, says: "The general rule is that remedies in respect to real estate are to be pursued according to the law of the place where the estate is situate," and adds, in the United States courts the distinction between common law and equity is preserved as to the remedies given: "Consistently with this construction it may be admitted, that where by the statutes of a state a title which would otherwise be deemed merely equitable, *is recognized* as a legal title; or a title which would be good at law, is, under circumstances of an equitable nature, declared by such statutes to be void, the rights of the parties in such case may be as fully considered in a suit *at law* in courts of the United States as they would be in any state court."

It is understood, that the state courts of Tennessee have decided that under their statutes declaring an elder grant founded on a younger entry to be void, the priority of entries is examinable at law, and that a junior patent founded on a prior entry, shall prevail, in an *action of ejectment*, against a senior patent founded on a junior entry. But this doctrine has never been extended beyond the cases which have been construed to be within the express purview of the statutes of Tennessee."

BANKS VS. MORENO.

In Banks vs. Moreno, 39 Cal., 233, the plaintiff sued under the daughters of Luis Peralta on the grant as a

complete title, and recovered in the lower court. The defendants offered in evidence the confirmation to one of the sons, which was excluded below, because the Mexican grant being complete to Luis Peralta, and his title descending to his children, the *subsequent* confirmation to one of them could not divest the perfect title. The Supreme Court held, first, that the title of Luis Peralta was not complete, because no tract of land was identified by the government; second, because Peralta had not a perfect title, he had an equitable title," and it required the action of the United States to *convert the equitable* into a complete legal title, and, therefore, the confirmation was evidence that such change in the title had taken place.

3d. The confirmation and official survey would have vested the title in the confirmee "for his own use, and to the use of those deriving title under him, to the exclusion of the sisters, under whom the plaintiff claims."—(Citing Estrada vs. Murphy, 19 Cal., 248; Rico vs. Spence, 21 Cal., 504.) The court say, 243-4, Mr. Stratton, a surveyor, testified that the natural and well defined boundaries are unmistakable, but think his testimony does not go far enough to bring the grant within the admitted rule, that the land may be identified by parol proof. The court say, 239: "In short, any description will suffice which identifies the land granted, * * either by the calls of the instrument, as applied to the land, or by aid of the descriptive portions of the grant," and when the description is complete the title "is complete and perfect." —(p. 240.)

This shows that Estrada vs. Murphy, 19 Cal., 248, is cited to show that, when the quantity is vague and not indentified, the Mexican papers do not make a grant, and therefore the claimant under them makes out an insufficient case until he obtains a confirmation. On page 337, Stevenson vs. Bennett, 35 Cal., 431, is also cited, and it also repeats the very same principle, and relies on Estrada vs. Murphy as a precedent, saying, p. 434, "under

the rule in Estrada vs. Murphy its title, whatever it may have been, was imperfect, (being an unlocated pueblo right;) and, being imperfect, was therefore within the operation of the act of Congress." On page 431, Minturn vs. Brower, 24 Cal., 644, is cited as correct, and that the pueblo title sued upon would have sustained the action, had it been for a specific tract.

Lindsey vs. Miller, 6 Pet., 666, 675, says: "As by the deed of cession the fee to this district, northwest of the Ohio river, passed to the United States, patents for lands entered and surveyed within it necessarily emanated from the general government."

CASES DECIDING THAT IN THE UNITED STATES COURTS, IN EJECTMENT, THE LEGAL TITLE ONLY IS AVAILABLE.

Bennett vs. Butterworth, 11 How., 669, was action for slaves—says the distinction between legal and equitable actions must be preserved, and that the state practice cannot change this rule in United States courts.

In Fenn vs. Holme, 21 How., 481, the facts showed an incomplete title under the United States laws to part of the public land. The decision is on the ground that it was an equitable title only, and refers to Bennett vs. Butterworth, 11 How., 669.

In Hooper vs. Scheiner, 23 H., 235, the land was public, and defendant had a patent, and plaintiff sued on an entry and state law.

In Greer vs. Meezes, 24 How., 268, plaintiff had a patent for California lands, and it was held better title than an *undefined* Mexican grant confirmed, of which possession had never been delivered by Mexico. "Its boundaries and quantity still remain uncertain and undefined."

In Sheirburn vs. Cordova, 24 How., 423, plaintiff had a mere head right under United States laws. Defendants

relied upon a Mexican grant. Plaintiff has not the legal title, and cannot recover.

In Miles vs. Caldwell, 2 Wall., 35, 44, Mr. Justice Miller holds that the ordinary practice in ejectment, in Missouri, in the United States courts is changed by the state law, which makes one judgment a bar to another action, saying: "It is a rule of property, and concerns the stability of titles. * * It is a matter which involves something more than a mere rule of practice. It is a question whether a matter, which is conclusive of the title to land in the state courts, shall have the same effect in the federal courts. It is our opinion that it should." See Mr. Justice Swayne to same effect in Barrows vs. Kindred, 4 Wall., 399; also, Mr. Justice Field in Hardy vs. Johnson, 1 Wall., 371, where there was a recovery in ejectment by *one* tenant in common of the *entire* premises under the ruling below. He says "the ruling (below) was in conformity with the settled law of the state. Under the allegation of seizin in the complainant it was sufficient, as determined by adjudications of the supreme court of the state, for the plaintiff to establish any interest in the premises, which gave him a right of possession. The action of ejectment determines no rights but those of present possession."—(See also Herbert vs. Herbert, Breese R., 354.)

In Higueras vs. U. S., 5 Wall., 827, Mr. Justice Clifford says: "Original claimant acquired a *possessory right* to the tract of land situate in Santa Clara county by virtue of a decree of concession of that date made to him by the governor of the territory. Directions of the decree of concession were that the applicant for the tract should be put in possession of the same by the commissioner of San José." "Concessions or grants of land by Mexican

governors were of three kinds, and, in some respects, the rules applicable to their construction are widely different. They were concessions or grants by *specific boundaries*, where, of course, the donee is entitled to the entire tract; or concession or grants by *quantity*, or of one or more leagues of land at some designated place, or within a larger tract described by what are called out-boundaries, where the donee is entitled to the quantity specified and no more; or grants or concessions of a certain place or rancho by *some particular name*, either with or without specific boundaries, where the donee is entitled to the tract according to the boundaries, if boundaries are given, or, if not, according to the extent and limits of the tract or rancho, as shown by the proofs of settlement and possession."—(833–4.)

In Sparrow vs. Strong, 3 Wall., 97, which was an ejectment on a mere possessory title in a part of the original Mexican territory, where the question of jurisdiction was raised, Mr. Chief Justice Chase is explicit in distinguishing it from Lownesdale vs. Parrish, 21 How., 290, where the court refused to take jurisdiction on the ground that Congress had by law declared territorial titles null, adding: "The writ of error now before us relates to a very different subject of controversy. The territory of which Nevada was a part was acquired by treaty. Rights and titles acquired under ceding governments remain unimpaired under our government. * * We know also that the territorial legislature has recognized by statute the validity and binding force of the rules, regulations, and customs of the mining districts. * * We cannot dismiss this writ of error, therefore, on the ground that a controversy concerning the *possessory title* to a mining claim, existing under the express sanction of the territo-

rial legislature, and the implied sanction of the national government, does not relate to a subject-matter capable of being valued in money."

2 Washburn on Real Property, 2d edition, p. 551, says it has been held in many cases that the government may grant land without deed, and numerous cases are cited to this effect.

M. BLAIR,
F. A. DICK,
Of Counsel for Plaintiff in Error.

March, 1872.

Supreme Court of the United States.

REUBEN S. CARPENTIER, PLAINTIFF IN ERROR,

vs.

Z. MONTGOMERY *et al.*, DEFENDANTS IN ERROR.

Supplemental Propositions.

1. The Spanish grant to Luis Penalta was a perfect grant in fee and gave him a complete legal title.

2. This perfected title is protected by the treaty and the law of nations, and needs no confirmation; consequently the plaintiff's rights under it could not be extinguished by a failure to present it to the Board of Land Commissioners.

3. If it should be held that this title, although perfect, was, nevertheless, subject to the control of Congress, and that under the Act of March 3, 1851, it was necessary to present it for confirmation under the penalty of having the lands deemed and held to be public lands, then the confirmation of it, no matter how or by whom procured, is a final and conclusive adjudication on the point that at the time of the acquisition of California these were not public lands; and the title, so confirmed, being a complete and legal one, could not be divested nor transferred by the fact of confirmation.

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2. This perfected title is protected by the treaty and the law of nations, and needs no confirmation; consequently the plaintiff's rights under it could not be extinguished by a failure to present it to the Board of Land Commissioners.

3. If it should be held that this title, although perfect, was, nevertheless, subject to the control of Congress, and that under the Act of March 3, 1851, it was necessary to present it for confirmation under the penalty of having the lands deemed and held to be public lands, then the confirmation of it, no matter how or by whom procured, is a final and conclusive adjudication on the point that at the time of the acquisition of California these were not public lands; and the title, so confirmed, being a complete and legal one, could not be divested nor transferred by the fact of confirmation.

4. In his decree of August 3, 1820, Governor Sola directed the officer who should deliver the possession to Peralta to "place landmarks at the four points of the compass," in order "that it may be known at all times the extent of the said lands which have been granted to him." And in his return to the writ of possession, in order that these things might be "evident for all time," Lieutenant Martinez reported that the boundaries of Peralta's land were marked out, that on the said boundaries were fixed "four landmarks," (in the record misprinted "firm landmarks"), and that he, in the name of his Catholic Majesty and in the presence of witnesses, put Peralta in possession of the said land. This record is competent evidence and proof of the facts stated therein; and the parol evidence in this case, as shown by the bill of exceptions, proves that these boundaries and objects can be found and identified upon the ground, and that they constitute complete and closed boundaries; and this is equally true whether the original possession or the restricted possession be regarded as the conclusive act under Sola.

5. The boundaries proved at the trial are natural and complete boundaries, and are, in every particular, identical with those fixed by this Court in the decree of confirmation; and that decree is conclusive upon both the United States and all persons claiming under the confirmees that these were the true boundaries of the original grant.

6. None of the parties to this suit hold or claim under the United States, but they all claim under a foreign and independent title.

7. Peralta was a prior purchaser from the Spanish Government—his possession, therefore, was necessarily an adverse possession.

8. The actual possession of Peralta is title sufficient to sustain ejectment, and in a suit upon his prior possession alone, without any other claim of title, the right to recover would be undoubted, save only for the legal presumption that these lands were public, which presumption is rebutted and overcome by the decree of the Supreme Court affirming the validity of Peralta's title.

9. All the parties to this action claim from a common ancestor and under a common source of title under which the defendants entered. *As between themselves*, their rights are legal, but whether legal or equitable, are not impaired or affected by the fact of confimation, and the defendants are estopped to deny either the validity of their ancestor's title or the plaintiff's right of possession.

10. Spanish and Mexican grants, whether legal or equitable, perfect or imperfect, conferred upon the grantees the right of possession.

11. This right was a legal one; and although the title of Peralta be incomplete and equitable merely, yet the possession under it was a strictly legal right, to be enforced by legal remedies, and is in no way impaired, nor its character changed, by the mere fact of confirmation.

12. If the Spanish or Mexican grant did not give a legal right of possession. neither will the confirmation, of itself, confer such legal right.

13. If the original title of Peralta be incomplete and equitable only, then the patent of the United States, when issued, will carry with it the legal title, and the right of possession and of recovery in ejectment will follow the legal title; but until final survey and patent the title remains inchoate and the right of possession unchanged.

14. No patent having been issued nor survey made, the proceedings for confirmation herein constitute a pending case, and the defendants can not, *pendente lite*, set up this confirmation to defeat the right of possession pre-existing in the plaintiff. The decree of confirmation is final *quoad* the validity of the grant, but is not final in every sense.

15. If the title of Peralta was a complete legal title, the confirmation of it, unless a mere nullity, inures *in law* to all persons lawfully holding under the original title.

16. If the legal title be still in the United States, it is not available by the defendants in this case to extinguish the plaintiff's possession.

17. The decree of confirmation (U. S. vs. Peralta, 19 How.) first declares and adjudges the title of Luis Peralta to be a good and and valid title to the full extent of its boundaries, and then confirms a part only to the claimantss in that case. This, however, was a valid confirmation of the entire title for the benefit of all persons equitably entitled.

M. BLAIR,

F. A. DICK,

Of Counsel for Plaintiff in Error.

IN THE

SUPREME COUR

OF THE

UNITED STATES.

REUBEN S. CARPENTIER,

Plaintiff in e

vs.

Z. MONTGOMERY et als.,

Defend

BRIEF FOR APPELLEES.

Houghton & Reyn

HENRY P. IRVING,
Of C

IN THE SUPREME COURT

OF THE

UNITED STATES.

REUBEN S. CARPENTIER,
Plaintiff in error,

vs.

Z. MONTGOMERY ET ALS.,
Defendants.

BRIEF FOR DEFENDANTS, APPELLEES.

It appears by the bill of exceptions that the plaintiff deraigns his title from the female heirs of Luis Peralta, to whom the grant was made by the Mexican Government, as shown by the documents referred to in the bill of exceptions; all of which are set forth in the transcript.

On the trial of the cause, the defendants, by their counsel, moved to strike out all the evidence introduced by the plaintiff in support of his right to recover.

The Court overruled the motion on the ground that it in effect amounted to directing a non-suit, but suggested to the defendants to submit their case on the testimony introduced by the plaintiff, and said he would direct the jury to return a verdict in their favor. (See page 34 of the printed transcript.)

The evidence on behalf of the plaintiff consisted of the documents referred to and some testimony intended to give practical effect thereto; but it was also proved by the plaintiff, as a part of his case, that the four sons of Luis Peralta, deceased, presented their petition for the confirmation of their claim for the Rancho of San Antonio, to the Board of Commissioners, organized under the Act of the 3d of March, 1851; that said Rancho was confirmed under said Act to the four sons of Luis Peralta in divided parcels, the portion embracing the demanded premises being confirmed to Domingo and Vicente Peralta by final decree of the Supreme Court of the United States—being the same case reported in 19 Howard, 343. It also appeared that no final survey had taken place under such confirmation; that the defendants deraigned title from the said sons of Luis Peralta, having acquired by mesne conveyances all the title which they, or either of them, had, in, or to the demanded premises, severally claimed by the defendants in their answers.

Upon the testimony, which will more particularly appear by the bill of exceptions, the Court

directed the jury to find for the defendants, which was accordingly done.

Your Honors will see, from the frame of the bill of exceptions, that it was the design of the Court below as well as of the counsel of both parties, in case of an appeal, to present the question directly to this Court: whether the plaintiff, upon the documents and evidence produced by him, could maintain an action at law against the defendants, for the recovery of the land in controversy.

Our first position is, that the title proved on the part of plaintiff, is only an inchoate or equitable title, which has no standing in a Court of law; and secondly, that even supposing the claim to be a perfect title, the plaintiff cannot recover against the confirmees, or those deriving title from them.

We think the documents set forth in the record, establish beyond doubt or difficulty, that the grant to Luis Peralta vested in him only an inchoate, incomplete, equitable title.

The opinion, that this title was a perfect title, seems to have arisen from the decision of the Supreme Court of California, in the case of *Minturn* v. *Brower*, (24 Cal., 644.) In that case the Supreme Court decided that where the titles to lands, granted by the Mexican Government, were perfect, the holders of such titles might submit them to the Board of Commissioners, but that they were not bound to do so; and that, as in

that case the counsel for the plaintiff admitted that the Peralta title, under which his client claimed, was a perfect title, the plaintiff who claimed under one of the sons of Luis Peralta, could not recover as against one claiming by conveyance from the daughters and heirs at law of Luis Peralta. The report of the case does not embody the testimony, nor is it stated in the opinion of the Court. The syllabus of the case is grossly inaccurate in stating that the plaintiff claimed under a patent. It appears from the opinion of the Court, that that opinion was based upon the concession of the plaintiff's counsel that the title was a perfect title. This appears throughout the whole opinion. No investigation was made as to the character of the papers showing the title of Luis Peralta.

The Court say, in reference to the documentary evidence: "It is maintained on the part of the appellants, that Luis Peralta acquired from the Government of Spain, while the Province of California belonged to that nation, a perfect title, or in the language of common law, a title in fee simple to the Rancho de San Antonio ; and that this title was subsisting and indefeasible when California was acquired by the United States, and the counsel for the respondent concedes the fact so to be."

The character of no one of the documents is discussed or even alluded to in the opinion. As to the abstract doctrine maintained in the opinion, we do not propose now to discuss it. What

we say is, that the Court did not decide upon the character of the title we are now discussing.

But this question has been put at rest by the subsequent case of *Banks* v. *Moreno* (39 Cal., 233).

That case was precisely similar, in all its features, to the case at bar. It arose under the same title. The same documents were produced on behalf of the plaintiff. The plaintiff in that case derived title under one of the female heirs, and sought a recovery against a defendant who traced his title to the sons of Luis Peralta, to whom the land was confirmed. It is not only a case in point in principle, but it is a decision, under the same circumstances, upon the very documents in question. The Court there comments upon the decision in *Minturn* v. *Brower*, and shows clearly that the Court, in that case, did not decide that the Peralta title was a perfect title. It quotes from the decision in *Stevenson* v. *Bennett* (35 Cal., 431,) the following, where the Court, in commenting on *Minturn* v. *Brower*, says: "But as to what would be regarded a perfect title, nothing was said directly, for the reason that the question was not involved in the case." Judge Crockett, who delivered the opinion of the Court in *Banks* v. *Moreno*, goes into an exhaustive examination of the documents, which were precisely the same as those in the case at bar, and shows, we think,

beyond all question, that the title granted to Luis Peralta is not a perfect title.

We could add but little to the reasoning of the learned Judge upon this point. We shall, therefore, for the convenience of the Court, quote extensively from the opinion.

He first comments upon the remarks of Chief Justice Grier in *United States* v. *Peralta* (19 Howard, 340): "that the grant by Sola of a portion of the tract of which Peralta had been originally put in possession, is a complete grant in fee of that portion," and shows that the statement of the proposition must be regarded only as the *dictum* of the Judge who wrote the opinion, and not as the adjudication of the Court.

After stating the general principles that would govern in determining what was a complete title, his Honor goes into a thorough discussion of the documents which were produced at the trial. He says: "In applying these principles to the grant to Peralta, we will first consider the grant from Governor Sola. In his petition for the grant, Peralta does not designate the land by any name, nor by reference to his occupation of it, nor by referring to any other document, nor even by quantity. The only description is, that at the distance of eight leagues northerly or northwesterly along the coast from the Mission of San José, there is a creek called San Leandro; 'and from this to a little hill adjoining the sea beach, in the same direction, and along the coast—there *may be four or five leagues*, more or less, or

about—which place and land he asks and solicits,' etc. If it be conceded that from this description it must be assumed that the land was to front upon the bay from the San Leandro Creek to 'the little hill adjoining the sea beach'—and if it be further conceded that the northerly line would necessarily be a line running easterly at right angles from the 'little hill,' or parallel with the general course of the San Leandro Creek—we should thus have three of the boundary lines, to wit: the creek on the south, the bay on the west, and a line running easterly from the 'little hill' on the north. But how was the eastern line to be ascertained? Not by quantity, because he asks for no particular quantity, unless the statement that between the creek and the little hill 'there may be four or five leagues, more or less, or about,' can be deemed a designation of quantity. He evidently asked for a tract, of which the San Leandro Creek was to be the southern boundary, and a line running easterly from the little hill was to be the northern boundary; and he intended to say in his petition, either that the distance from the creek to the little hill was four or five leagues, or that between those points there might be four or five square leagues of land, 'more or less, or about.' We will assume, as more favorable to the plaintiff, that it was the latter, and that he asked for these four or five leagues, 'more or less, or about.' This would furnish no basis whatever for locating the eastern line, for

the reason that the quantity was wholly uncertain. There is nothing in the petition by which it would be possible to fix this line, or to determine the particular quantity of land which he solicits.

"The document issued by Governor Sola, under date of August 3, 1820, is equally vague. He simply instructs Captain Arguello to appoint one of his subordinates to place Peralta 'in possession of the lands petitioned for,' and to 'place land marks on the four points of the compass, that it may be known at all times the extent of said lands which have been granted to him.' There is no description whatever of the land, except by reference to the petition. Nor does the return of Martinez to this decree for the delivery of possession remove the uncertainty. He says that the boundaries, which he designated on the ground, were the 'deep creek, called San Leandro; and at a distance from this (say about five leagues) there are two small mountains (*cerritos*); the first is close to the beach; next to it follows that of San Antonio, serving as boundaries to the rivulet which issues from the mountain ranges, and runs along the foot of said small mountain of San Antonio, dividing or separating the lands; and at the entrance of the little gulch there is a rock elevating itself in the form of a monument, and looking toward the north; on *both* boundaries were fixed firm landmarks.' All that can be deduced from this is, that he established the San Leandro Creek as the southern

boundary, and the rivulet running down from the mountains by the foot of the small mountain of San Antonio as the northern boundary, and that at the entrance of the little gulch (through which the rivulet flowed, as we infer), there was a rock in the form of a monument. He does not pretend to have established the eastern line, or to have placed monuments except on the northern and southern lines, and is wholly silent as to quantity. The eastern line was left as indefinite as it was before, and the quantity of land granted was in no manner defined, either in the grant or in the act of possession. If it be claimed that the monumental rock in the gulch must be assumed as the extreme easterly end of the northern line, and that a straight line from thence southerly to the San Leandro Creek, would give the boundary on the east, the answer to this proposition is, that there is nothing whatever in the return of Martinez, who delivered the possession, to indicate that the rock was intended to designate the eastern terminus of the northern line. On the contrary, it was obviously intended only to identify the gulch through which, as we infer, the rivulet flowed. But if the rock itself was intended as a monument to mark the boundary, there is nothing whatever to indicate that the northern line was to terminate at the rock.

"The second decree of the Governor, by which he removed the northern line further south, and the act of possession under it, do not

help the matter. By these, the northern line was fixed at 'a rivulet issuing from the mountain or hill range, which runs down to the beach, where is a little forest of willows (willow grove), fixing in said place the four landmarks, which shall be valid, and not those which were designated before on the little mountain of San Antonio.' Nothing is said of the eastern line, nor of the quantity. This brings us to the 'certifying document,' or *vista la peticion* issued by Governor Sola, in October, 1822, in which he describes the boundary fixed by Martinez on the north, as 'about one and a half leagues from the small hill of San Antonio, towards the part of San Leandro, serving as a dividing place, a small brook which falls from the mountains or heights running towards the beach, where ends a willow brake, establishing on said land the four landmarks.' Nothing is said of the other boundaries, nor of the quantity of land granted, unless what may be inferred from a reference in the first clause of the instrument to the petition of Peralta for the grant. As we have already seen, a reference to that petition cannot aid the uncertainty as to the quantity granted, or the location of the eastern line.

Our conclusion is, that from each and all of these documents, there was a total uncertainty, not only as to the quantity granted, but as to the eastern boundary of the tract. Nor was this uncertaity in any degree removed by the decree of Governor Arguello, of June 30, 1823, which

simply restores the northern boundary, as at first fixed by Martinez, at the little hill of San Antonio, but does not attempt to establish any other boundaries, nor to define the quantity granted. It may be said that we will take judicial notice of the prominent topographical features of the country, and consequently, that we must judicially know, that opposite this portion of the bay. the hills approach the water so nearly as to leave but a comparatively narrow strip of valley land. between the bay and the foothills, and that the inference is, that the Governor intended to grant to Peralta, all the land lying between the northern and southern boundaries, and the bay on the west, and the mountains on the east. But no such inference can be drawn from the documents on which we have commented. It would be a forced and unnatural interpretation of them, to hold that it was intended to grant only valley lands, or all the valley lands, without reference to quantity, lying between the northern and southern boundaries. On what theory could we limit the grant to valley lands? Why not include the foothills or the mountain sides, or the summits of the adjacent mountains? On the face of these papers, and with the most accurate knowledge of the topography of the country, it would be wholly impossible for any Court or Surveyor to locate the eastern line, or define the quantity of land granted."

Again, on page 244, he says: "On the whole' our conclusion is that the documents we have described, did not confer upon Peralta, a perfect title to any specific parcel of land." The Court here alluded to the documents signed by Sola and Arguello.

He then proceeds to show that the grant by Micheltorena did not make the title perfect. We refer your Honor to page 245 of the Report of the case, for the conclusive reasons he assigns therefor. One alone would be sufficient; the decree was not signed by the Governor, inasmuch as the formal title, the *titulo*, was afterwards to issue. It is an order that the grant be issued, recorded and presented to the Department of the Assembly. It contemplates further proceedings to be had by the Government. It is therefore, in no sense a definite grant.

The Court will observe that the authority from which we have quoted thus freely, is not merely an authority in point of principle; it is an adjudication as to the construction and effect of the very documents which are cited by the Plaintiff in support of his claim to recover in this action.

We have stated that the case of *Banks* v. *Moreno* was similar in all respects to the case at bar. It was so in respect to the documents introduced in evidence. But it will be perceived by the bill of exceptions, that the plaintiff, in order to avoid the conclusive effect of that decision, introduced certain evidence, as they contended, to show that

there was a perfect title to a portion of the land in controversy. (See transcript, fol. 39.) They gave parole evidence tending to show "that the boundaries of the restrictive possession were the creek of San Leandro on the south, southeast and east, the Temescal creek on the north and northwest, and the Bay of San Francisco on the west, and that the possession was reduced to the line of the Temescal creek; that the sources of San Leandro and the Temescal creek spring near each other, with merely a dividing ridge between them, not more than a quarter of a mile from the source of the one to the other, and that they both empty into the Bay of San Francisco.

The plaintiff thus attempted to show that as the sources of the San Leandro and Temascal Creeks came within a short distance of each other, and as these creeks were referred to in the grant of Sola, that the lands between these creeks were held by a perfect title.

These creeks penetrate far beyond the crest of the Sierras, and include between their sources a vast tract of mountainous land, wholly unfit for cultivation, which it is palpable never was intended to be included within the Peralta grant, as will appear by the documents themselves introduced by the plaintiff.

The Court will see, by referring to the bill of exceptions, that the plaintiff has introduced evidence, tending to show "that the original possession given by Martinez, was bounded by

the San Leandro Creek on the south, southeast and east, and the crest of the hills to the gap easterly of the monumental rock looking to the north, mentioned in the act or certificate of possession of Martinez; on the north and northwesterly by the creek of the cerrito of San Antonio, and on the west by the Bay of San Francisco." (See fol. 38.)

Thus, after attempting to prove definite boundaries, that is: the San Leandro on the south, the creek of the cerritos on the north, the Bay of San Francisco on the west, the crest of the hills on the east, they then attempt to show a perfect grant somewhat in the form of a triangle, made by the San Leandro and Temescal Creeks, including several leagues of land lying beyond the crest of the hills, which they had sought to prove as the eastern boundary.

This was the last desperate effort to show a perfect title to a portion of the land sued for. It was a theory wholly inconsistent with the documents and proofs introduced by the plaintiff. Well might the Judge remark (see fol. 66): "the idea recently suggested that the San Leandro Creek, throughout its whole course, was intended to be the boundary on the east as well as on the south, finds no place in previous discussions in the proceedings of the parties, and is inconsistent with Peralta's own statements. If there ever was any foundation for such a pretension, it appears to have been entirely aban-

doned when Ignacio, in his father's behalf, petitioned afterwards for another grant with new boundaries, viz: the tops of the hills which are to the westward of the upper portion of the San Leandro, thereby waiving any right, if any existed, for the further boundary beyond the hills, up to the San Leandro, and the lands on the eastern slope of the mountains."

We have been thus particular in stating this part of the case, not that we regard it as at all necessary to refute a pretension so ridiculous and so inconsistent with the documents produced by the plaintiff, and with the evidence which he himself has introduced to show different boundaries; but we regard this attempt on the part of the plaintiff as a substantial admission that the boundaries of the Peralta grant were unsettled and indefinite.

It appears by the evidence, that the claim under this grant was presented by the sons of Luis Peralta to the Board of Land Commissioners, in the year 1852, and to this day there has been no final survey approved by the Court.

From the time of the decision of the Supreme Court upon the validity of the grant, there has been an active contest, still undetermined, as to the location of the ranch. Now, the plaintiff in this case springs a new theory as to its boundaries; a theory by which the crest of the hills is to be abandoned as one of the boundaries, and the lines extended far beyond the hills, embra-

cing several leagues of land never before regarded as included in the grant.

The present case, therefore, stands before your Honors in a position far stronger for the defendants than in the case of *Banks* v. *Moreno*.

The first inquiry, then, for your Honors is, whether parties who never presented their claim before the Land Commission can, under an imperfect title, maintain an action in a court of law against the confirmees of the title or those claiming under them.

In the case of *Estrada* v. *Murphy* (19 Cal., 248), it was decided that where land is held by an imperfect or merely equitable title, the claim for the same must be presented to the United States Board of Land Commissioners for confirmation, and if not so presented, will be deemed as abandoned and be treated by the Court as non-existent, whatever may have been its original validity; and the land claimed under an unconfirmed grant will be regarded as public land of the United States. That whatever doubts there might be as to the validity of the legislation of Congress, requiring presentation to the Board of Claims, where the lands are held by perfect titles acquired under the former Government, there could be none as to the validity of the requirement of presentation to the Board of all claims to lands held by imperfect or merely equitable titles.

It was further decided, "that the confirmation

under the Act operates to the benefit of the confirmee and parties claiming under him, so far as the legal title to the premises is concerned. It *establishes the legal title in the confirmee, and this must control in the action of ejectment.*"

In this case the plaintiff, whose grantor never presented his claim to the Board of Land Commissioners as required by the Act, seeks to recover against the confirmees and those claiming under them, *and presents as a part of his case the fact of the confirmation to the defendants.* In other words, having established his relation as heir to the original grantee, he seeks to recover against the party *who holds under a decree which establishes the legal title in the defendants.* No case has ever yet been decided in California where, in an action at law, a plaintiff has recovered on such a title against the confirmee or those claiming under him.

It was decided in *Ferris* v. *Coover* (10 Cal., 627), that the Mexican grantee, even upon an equitable title, might maintain an action of ejectment against an intruder upon the lands embraced within the boundaries of the grant. But no such proposition was ever asserted in this State, as that such an action could be maintained *against the confirmee* of the land.

In the case of *Ferris* v. *Coover*, the plaintiff proved prior possession and showed his connection with the grant. The defendants did not attempt to establish any such connection. The

Court rested its opinion in favor of the recovery mainly upon the ground that the grant gave to the grantee the immediate right of possession. Of course, the right of the plaintiff to recover depended upon the proof that the land sued for was within the boundaries of the grant.

The decision in *Ferris* v. *Coover* has been followed by many cases maintaining the same doctrine. I may remark here, that the effect of a confirmation is considered so well established in this State, that in actions of ejectment it is not considered necessary to introduce the original papers or documents constituting the *espediente,* where there has been a confirmation of the claim. The plaintiff usually introduces the decree of confirmation to himself or his grantors. The decree of confirmation is always considered as a judicial determination, settling the right of the claimant to the land.

The inquisition upon the title prescribed by the Act of 1851, constituting the Board of Land Commissioners, is in the nature of a proceeding *in rem.* It is the decision of a tribunal having jurisdiction over the subject-matter of the grant, binding upon all parties to the extent provided by the law. It had jurisdiction to determine upon the validity of the grant, as well as jurisdiction to determine as to the parties who were entitled to the confirmation. Where, then, a claimant presents his claim to the Land Commission, and shows either a grant to himself or a title from the grantee of the Mexican Govern-

ment, and where the Commission has determined the validity of the grant, and in the case where the party, claiming a derivative title from the grantee, and it has determined that such claimant has so obtained the right to a confirmation, that confirmation establishes the title of the grantee. Unless this is so, the Act of 1851 is a nullity. It prescribed a series of vain, idle and expensive ceremonies—determined nothing—and settled nothing.

Our position, then, upon this branch of the case, is briefly this: that the Peralta grant was an inchoate and imperfect title. That the decree of the Land Commission, and of the Supreme Court of the United States, *established title to the premises in the confirmees* and *those claiming under them*, and that in the face of that confirmation to the defendants, the plaintiffs cannot recover in a Court of law, although they may have shown that they derived their title from the legal heirs of Luis Peralta, the grantee of the Mexican Government.

Secondly—We contend that even if the Peralta grant was not an inchoate and imperfect title, but was perfect and complete, *no action could be maintained against the confirmees*, by *parties who have not* presented their claim and obtained a confirmation of the same.

The position assumed by the plaintiff is, that titles to land by grant from Mexico or Spain, that were perfect at the time of the acquisition

of California, were not required to be submitted to the Board of Commissioners under the Act of the 3d of March, 1851; that such titles as were perfect at the time of the acquisition of California, remained as valid under the new Government as they were under the old, and that without having been presented to the Board of Land Commissioners for confirmation, they may be asserted and maintained in the Courts of the country. It is admitted, we believe, by the Court, in *Minturn* v. *Brower*, that *imperfect titles* stand upon *no such basis*, but that such titles, unless presented within the time prescribed by the act of Congress, become forfeited, and from that time would be deemed and held as a part of the public domain of the United States.

The Act of 1851 requires that each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Governments, shall present the same to the said Commissioners when sitting as a Board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims. The law requires, further, that the said Commissioners shall decide upon the validity of the claims so presented.

It is plain that the law makes no distinction between perfect and imperfect claims. It is impossible to escape from the conclusion that all claims, whether perfect or imperfect, are required to be presented for confirmation.

This construction of the Act of 1851, if it needed confirmation, has been given by the Supreme Court of the United States on several occasions. In the case of the *United States* v. *Fremont* (1 Howard, 552), the Court decided that the 8th Section embraces not only inchoate or equitable titles, but legal titles also. The Court say it requires them *all* to go under examination and to be passed upon by the Court. The object of this provision appears to be to place the titles to land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them on the records of the country in a manner and form that will prevent future controversy.

In Fossat's case (21 Howard, 447), the Court decide: that the matter submitted by Congress to the inquiry and determination of the Board of Commissioners, are the claims *of each and every person in California*, by virtue of any right or title derived from the Spanish or Mexican Government. In this case the Court further say: These Acts of Congress do not create a voluntary jurisdiction that the claimant may seek or decline; all claims to land that are withheld from the Board of Commissioners during the legal term for presentation, are treated as non-existent, and the land as belonging to the public domain. Farther on, the Court use this language: "This jurisdiction comprehends every species of title or right, whether resting in contract or evinced by authentic and judicial possession."

In Higuerra's case (5 Wall., 832) it is said: Private land claims, such as are recognized in that Act, are those that arise by virtue of a right or title derived from the Spanish or Mexican Government. Every person claiming such lands in California was required to present his claim to the Land Commissioners for adjudication; and the provision was that all land, the claims to which should not have been presented to the Commissioners within two years from the date of the Act, should be decreed, held and considered as a part of the public domain of the United States.

Against the decision in *Minturn* v. *Brower*, we present the above conclusive views of this Honorable Court as to the construction of the Act of 1851. Indeed, as to that construction there can be no doubt but that the law requires the presentment of *all* claims, whether perfect or imperfect. Any question that arises in reference to the necessity of presentment of perfect claims, must be based, not upon the *construction* of the Act of Congress, but upon *its validity.*

The decision in *Minturn* v. *Brower*, by the Supreme Court of California, from which this question has arisen, seems to be based upon the idea that the Congress of the United States had no right to pass any law requiring the presentation of perfect claims, and making their non-presentation a ground of forfeiture. In that case (*Minturn* v. *Brower*, p. 671) the Court use

this language: "If it were necessary to construe this provision as working an annulment of a perfect title, we should be compelled to hold it to be repugnant to the stipulation of the treaty, which are of paramount obligation; and we believe it would be so held by the Supreme Court of the United States, if directly presented to that tribunal."

It was held in that case that the provisions of the Treaty of Guadalupe Hidalgo operated as a confirmation *in presenti* of all perfect titles to lands in California held under Spanish or Mexican grants made prior to its ratification.

The decision in *Minturn* v. *Brower* was, that as the treaty operated as a confirmation *in presenti* of all perfect titles to lands in California held under Spanish or Mexican grants, the Act of Congress, if construed as intended to embrace perfect titles, would be repugnant to the treaty and therefore void.

This is, in fact, the only position that can be taken by the plaintiff. That the Act of Congress requires the presentation of perfect as well as imperfect titles, is too clear to be controverted.

It is, then, into the *validity* of the Act that we have to inquire.

In the first place, we deny the proposition that the treaty operated *in presenti* on all perfect grants, as stated in the opinion.

It is plain that if the treaty operated as a confirmation *in presenti* of perfect titles, it was

equally effective as respects imperfect titles. The ninth clause of the treaty provides that the Mexicans who shall not preserve the character of citizens of the Mexican Republic, shall be incorporated into the Union of the United States, and be admitted to the enjoyment of all the rights of the United States, according to the principles of the Constitution, and in the meantime "shall be maintained and protected in the free enjoyment of their liberty and property." This language embraces all property. The word "property," when used in reference to lands, applies as well to equitable as legal interests. It embraces every species of right. The owner of an inchoate title has a vested interest in land, as well as the owner of a perfect title. If the argument, then, of the Court in *Minturn* v. *Brower*, is true as to perfect, it is true as to *imperfect* titles. It is an argument, then, against the validity of the Act, so far as it operates upon titles, whether perfect or imperfect. Again, it is held in *Minturn* v. *Brower*, that a party holding a perfect title, whilst he was not bound so to do, *might* have presented the same for confirmation. We submit that this concession is wholly inconsistent with the position assumed by the Court in that case. If perfect titles were confirmed *in presenti* by operation of the treaty, and could not be required to be presented for confirmation, we are at a loss to see how it is that the Land Commission could have any jurisdiction over them. If they were confirmed by the treaty and were

perfect titles, where the propriety of another confirmation? Where is the ground of jurisdiction?

Suppose, according to the view of the Court in that case, a claimant, holding a perfect title under the Mexican Government, voluntarily presents his claim to the Land Commission, and that Court decides against the validity of his claim; does the land, to which he had a perfect title under the Mexican Government, and which the treaty has confirmed, become the property of the United States? This would seem to be the inevitable conclusion, from the admission made in the opinion, that a claimant of a perfect title might voluntarily submit his claim to the Board of Commissioners.

But we dissent altogether from the proposition that the Congress of the United States had no right to require the presentation of perfect claims. The language of the treaty evidently required legislation to carry it into effect. It contemplated legislation by Congress. It did not operate *in presenti*. Such clearly was the view of Congress. And such was the design of the framers of the Act of the 3d of March, 1851. We maintain that that Act was a faithful attempt to carry out the stipulations of the treaty, and to protect the property of Mexicans as contemplated by the treaty.

The object of the Act was, to separate the public lands acquired from Mexico from the private lands owned by individuals, and secondly,

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The consideration of these cases in the Florida Treaty was that it requires to carry it into effect legislation
See Foster vs Neilson 2 Pet. 314 -
U S vs Arredondo 6 Pet 691 -
7 Pet 51 -
U S vs Clarke 8 Pet 436. cases that it does not operate in præsenti

to fix a permanent and substantial basis on which titles might rest. In both of these objects, Mexicans holding perfect titles were deeply interested.

Let us look at the situation of things at the time that this law was passed. Neither the grants made by the Mexican or the Spanish authorities, had been regularly surveyed. Rude *disenos*, intended to delineate the features of the lands of which grants had been solicited, were to be found in the archives. In many cases, the *espedientes* were wanting. There were petitions without *disenos*. Orders of reference, informations, correspondence, licenses, orders of concessions—all in a foreign language. *Disenos* generally represented a larger tract of land than that granted. The boundaries intended to be fixed, were generally so imperfectly delineated, as to present an endless source of litigation. A rude and unlettered people, unacquainted with our system of laws or the mode of procedure in our Courts, were to be subjected to a judicial system wholly unknown to them. We ask, if in contemplation of this state of things, it was not necessary and proper that the same system which had been adopted by the United States in other Territories acquired by treaty, should be adopted in this? Whether they adopted the most effective and beneficial system, is not the question. The question is, whether the system they adopted was in violation of the treaty.

The Constitution of the United States grants

to Congress the power to "make all needful rules and regulations respecting the territory or other property belonging to the United States." By another provision, it has the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

It will not be denied that the Congress of the United States had the right, under the above specific grant of power as to the public lands, as well as under the clause last quoted, to pass a law for the purpose of ascertaining and settling private land claims in the State of California. As we have said before, the question is not whether they have adopted the best mode of carrying out the provision of the treaty for the protection of property, but the question is, whether they have exceeded their powers. The clause of the Constitution last quoted, clearly gives to Congress the power of legislation necessary to render efficient the treaty.

As to the means adopted for carrying out its provisions, Congress is the sole judge. It is not for the Judicial Department of the Government to decide as to whether Congress has adopted the proper means to effect that object. It is a legislative, not a judicial question, as decided by this Court, in the case of *McCullough* v. *The Bank of the United States.*

But we insist that the Act of 1851, in its general provisions, was wise and judicious, and protective of the rights of the holders of Mexican grants, whether perfect or imperfect.

It has never been my fortune to see what is called a perfect grant of lands in California by the Mexican or Spanish Government. No such grant has ever made its appearance in the Courts of this State, so far as I am informed. I believe that neither the judicial records of the State, nor the archives containing Mexican and Spanish grants, furnish a single instance of this imaginary perfect Mexican or Spanish grant. They are all incomplete, either as to boundaries or as to the title conveyed. Let us suppose a Mexican or Spanish grantee in possession under his perfect grant. A horde of American squatters take possession of his extended domain; he institutes suit against the intruders. Now, in the first place, in order to prove the title to his land, he must establish the various documents under which he claims title. In every suit that he institutes he must go through the same proof. He is exposed to the expense, trouble and difficulty of establishing his title by proving the documents on which it rests. In case he should wish to sell or dispose of his land, he has no means of authenticating his title. The boundaries are uncertain; the title is alleged to have been forged; the witnesses to the execution of the grant have all passed to their final account,

and he has no means of satisfying a purchaser as to the validity of his title.

I have thus described the position of a Mexican grantee of a perfect title, unauthenticated by the proceedings provided for by the Act of 1851. Now, that Act provides for a party in this situation, a mode by which he can authenticate his title, both as to its validity as well as to its boundaries. That Act provides, after the judicial investigation into the character of his title, for the issuance of a patent, which patent shall be conclusive evidence, both of the validity of the grant and of the boundaries thereof. That patent is a record importing absolute verity, establishing the fact that on a certain day the Mexican Government made to the grantee a concession of the land described in the patent. Instead of being compelled, in an action of ejectment, to prove the execution of the documents, or, what would be much more difficult in most cases, the boundaries of his land, he has only to produce his patent from the United States, which establishes all that is necessary. He has a firm and substantial basis of title, to which he and all purchasers from him may resort for recovery of the land or for protection against trespassers and intruders.

Can a law which permits and requires of the claimant to present his claim under a perfect title and thus obtain a judicial determination, settling its validity as well as its boundaries, and

making the result of that judicial determination a record to which he might appeal for the truth of all matters determined therein, be regarded as violative of the terms of that article of the Treaty with the Government of Mexico which provides that the Mexican citizens of this State "shall be maintained and protected in the free enjoyment of their liberty and property?"

The right of the United States to ascertain what land she had obtained by the treaty with Mexico, necessarily implied the power of ascertaining what lands were owned by individuals. In ascertaining, therefore, the public lands, they must necessarily ascertain the boundaries of the private. All lands belonged either to the Government of Mexico or to private individuals. There was no way in which the Government could ascertain the public lands derived from Mexico, except by a settlement of private land claims. The right of requiring the party holding a grant, perfect or imperfect, to present his claim to a Commission such as that constituted by the Act of 1851, was not even a harsh exercise of power by the Government of the United States. It conferred the greatest benefit upon the claimant, and, in fact, gave him the protection to his property for which the treaty had provided.

Whilst the law was highly beneficial in its operation to the grantees of perfect titles, if any such existed in California, except by prescription, it was equally so in its operation on the interests of the State. Most of the valuable

lands were covered by Spanish grants. It was important, therefore, that there should be an end of litigation as to the validity as well as the limits of those grants. The proceedings required by the Act of 1851, resulting in a patent, gave a firm and substantial basis on which purchasers might rely, which, in no other way could have been effected.

The policy of this law may be regarded as similar to that which provides for the probate of a will. The probate of the will establishes the fact of its execution by the testator, binding not only on all parties claiming under the will, but binding and conclusive in all Courts. No litigant can raise a question as to the execution of the will, after it has been admitted to probate.

So, in all controversies arising in relation to land for which a patent has been issued under the Act of 1851, there can be no question as to the validity of the grant, or as to its limits.

The patent defines precisely what land has been granted to the claimant.

The holder of a perfect title, without this protection afforded by the Act of 1851, would be in a helpless state, not only as respects intruders, but as against the claimants under the United States. He might hold a paper title, perfect and complete, but we apprehend that without its authentication under the authority of the United States, it would avail him little.

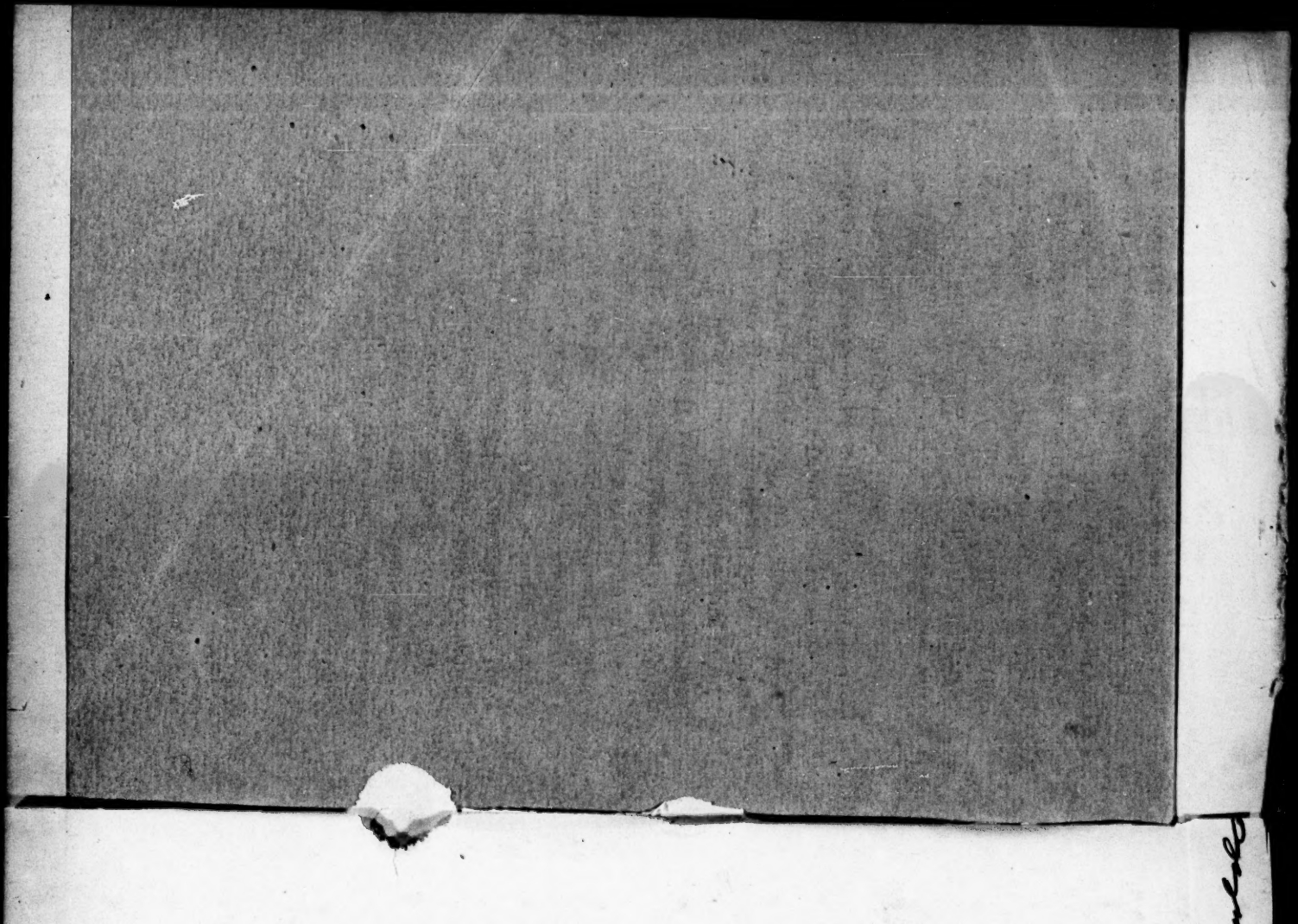
In this discussion in reference to perfect titles,

I have necessarily anticipated the argument on behalf of the plaintiff.

I have endeavored to controvert the principles laid down in the case of *Minturn* v. *Brower*, which I believe is the only respectable authority that can be found in favor of the position that the claimant of a perfect title was not bound to present his claim to the Board of Land Commissioners, and that he might recover against the confirmee of the title, or those claiming under him. The opinion in that case, so far as it may be considered to have decided the Peralta claim to be a perfect title, has, as I have shown, been repudiated by the Supreme Court of California, in *Banks* v. *Moreno*. It is its abstract doctrine as to perfect titles, I have been contesting in the second branch of this argument. I think I have shown that the doctrine of the Court in that case, in regard to perfect titles, can no more be upheld than its assumption that the Peralta title was a perfect and complete title.

I have not, in the foregoing discussion, entered into the question as to the right of the plaintiff to go into a Court of equity for the purpose of holding the confirmees and their vendees as trustees, holding the legal title for the benefit of the legal heirs of Luis Peralta. Because I consider that the only question involved in this case is, whether, in a *Court of law*, the plaintiff has a right to recover.

Naughton & Pegram



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IN THE

Supreme Court of the United States.

No. 159.—December Term, 1871.

REUBEN S. CARPENTIER, Plaintiff in Error,

vs.

Z. MONTGOMERY, et al., Defendants in Error.

Points for Defendants.

I.

The treaty of Gaudalupe Hidalgo does not confirm *in presenti* any title, perfect or imperfect. It guarantees that the inhabitants of the ceded territory shall be maintained and protected in their property, and contemplates legistion to carry this provision into effect.

II.

The act of March 3d, 1851, requires the presentation, within the time therein limited, of the claims of each and every person claiming title to lands derived from Spain or Mexico, without reference to the character of the title, whether perfect or imperfect. It does not divest any vested right. On the contrary, it affords to the persons affected by it, the very protection guaranteed by the

treaty, and enables them to secure, by complying with its provisions, record evidence of the highest character, of the validity of their titles.

III.

The confirmation to Domingo and Vicente Peralta, is not to them as heirs of Luis Peralta, but as his devisees, and they must have established their derivative title, or a divided parcel of the rancho would not have been confirmed to them.

IV.

The confirmation does not enure to the benefit of plaintiff's grantors. Their failure to present their claim debars the plaintiff from asserting any claim to the land in question. As between him and the United States it is public land, and as between the confirmees on the one hand, and all the world on the other, it is the private property of the confirmees.

V.

The confirmation establishes the validity of the grant, and the right of the confirmee under it. The approved survey completes the title, and the patent furnishes the confirmee with record evidence of the confirmation to him, and of the location of the land confirmed.

VI.

Under the Spanish and Mexican systems the grant, as it is termed, did not describe with precision the land to which it was intended to apply. The measurement and segregation was the last act of the series required to vest in the grantee a title in fee, and this was the office of a juridical possession.

VII.

A juridicial possession was more than a mere livery of seizin. It was a proceeding by which the land granted by general description was separated from the public domain by means of a measurement, and the establishment of specific boundaries, of which a record was required to be made, and which formed a part of the evidence of the grantee's title. The record of this proceeding furnished a description for the grant. Under our system the survey precedes the patent, while under the Spanish and Mexican systems the survey is not made until after the issuance of the grant.

VIII.

If the grant to Luis Peralta was perfect, in the sense that the governor had done the last act required to be done by him to make a complete grant under the Spanish law, still it was not such a grant as vested in Peralta the fee of any land, because there had been no segregation of any tract to which the grant could apply. The return by Martinez of his proceedings does not show that he made any measurement, nor does it give a specific description of any tract of land. There is, therefore, no description furnished for the grant which is any more certain than the general description contained in Peralta's petition.

IX.

Neither the grant, nor the return of Martinez, gives the tract of land any eastern boundary.

X.

The declarations of Luis Peralta, contained in the several documents set out in the record, that the land he claimed extended from the top of the mountains to the

shore, is evidence that the San Leandro creek was not designated as his eastern boundary when possession was given.

XI.

Although it would be admissible to prove by parol the location of a descriptive call of the grant, or of the return made by Martinez, it would not be competent to supply by parol testimony a descriptive call not found in either of those documents.

XII.

The plaintiff is not a "third party" whose rights are saved by section 15 of the act of March 3d, 1851. He claims under the same title with the confirmees, and section 13 of that act provides for the protection of persons who claim under the same title, showing thereby that the "third persons" mentioned must be those who claim under adverse titles, the same; or a portion of the same land.

S. O. HOUGHTON,
Of Counsel for Defendants in Error.